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Persecution by Third Parties

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## CHAPTER I. INTRODUCTION\*

'Persecution by third parties' is one of the most controversial issues in contemporary refugee law. Although nowadays the most restrictive interpretation according to which persecution within the meaning of the Refugee Convention is interpreted as exclusively persecution by State organs only has been abandoned in most jurisdictions, States Parties to the Convention are strongly divided on the issue of the extent of State involvement in persecution by non-state organs, not to mention the question whether there should be any State involvement at all. The consequences of the different positions are considerable. If persecution by third parties is only accepted if 'it is encouraged or permitted by the authorities' States are allowed to avoid recognising as refugees people persecuted by 'non state agents' such as rebel groups or extremist organisations. According to this position in a civil conflict only a person targeted by the government could qualify for refugee status, but someone else persecuted by the opposition not. And if governmental authority collapses altogether – as has happened recently in several countries – no one might qualify for refugee status.

As a large number of the present day asylum claims concern situations of civil war or of a break down of (central) governmental authority the issue of persecution by third parties is of great importance. Although the main characteristics of the different positions are clear, precise information about the interpretation and the application of the concept of third party persecution in the Member States of the European Union is still lacking.

With a view to conclude to a more precise policy position on the issue the Dutch Ministry of Justice considered it necessary to commission through its Research and Documentation Centre this comparative research on the interpretation and the application of the concept of persecution by third parties in some Member States of the European Union (France, Germany, Italy, The Netherlands, Sweden, United Kingdom) and in Switzerland and Canada (which countries both are notable for their elaborated interpretation of international refugee law). The results of this comparative analysis may also be of importance for the ongoing process of harmonisation of asylum and refugee law in the European Union. Although the EU-Member States in their Joint Position of 4 March 1996 on the harmonised application of the definition of the term 'refugee' reached a compromise on a common wording of 'Persecution by third par-

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\* This study was commissioned by the Research and Documentation Centre of the Ministry of Justice of the Netherlands.

ties', this compromise leaves the Member States free to follow their own 'national judicial practice' in this respect.

The research questions for the countries concerned were formulated as follows:

**1. Which interpretation is given to the term 'persecution' where a central government no longer exists in the country of origin of the asylum seeker?**

1.1 Which countries do accept the possibility of persecution in such circumstances (liberal interpretation) and which do not (restrictive interpretation)?

1.2 If not, for which countries of origin and for which periods of time is persecution excluded?

1.3 Which countries offer temporary protection to asylum seekers fleeing civil-war situations?

Which criteria are used to establish the fact that there is a civil war. Is a civil war considered as an equivalent of a situation in which a central governmental authority does not exist any longer?

**2. Which countries do recognise persecution by third parties?**

2.1 Which of the countries concerned do apply on the one hand a restrictive interpretation as mentioned sub 1.1 and on the other hand do accept persecution by third parties? How are both interpretations interrelated?

2.2 Under which conditions is persecution by third parties (distinguished as local/ de facto authorities, death squads or violent opposition groups) in these countries accepted as persecution in the meaning of the Refugee Convention?

2.3 Which role does the existence of an internal flight alternative in the country of origin plays in this regard?

**3. In a situation where no central governmental authority exists any longer which of the countries concerned do nevertheless accept the possibility of persecution in the meaning of the Refugee Convention of local and/or de facto authorities?**

3.1 If so, what criteria are used to establish the fact that there is an entity qualifying as a de facto authority?

3.2 What kind of information is used to establish de facto authority?

**4. Is the Joint Position of 4 March 1996 adopted by the Council of the European Union on the harmonised application of the definition of the term 'refugee' taken into account in current policy and/or jurisprudence?**

The research questions have been 'translated' into a questionnaire which is submitted to selected respondents in the countries concerned (annex 1). Although not following the precise order of the research questions as mentioned above, the questionnaire covers all the relevant aspects of these questions. The country reports based on the replies of the respondents are published as annex 2. Chapter III offers a comparative analysis of the country reports and thereby an extensive answer to the research questions. This chapter is preceded by a theoretical analysis of the concept of persecution by third parties based on the relevant legal literature and leading cases (chapter II). Chapter IV contains the conclusions of the comparative and theoretical analysis of the preceding chapters with reference to above formulated questions.

The researchers have to express their gratitude to the respondents for their co-operation and very informative replies and their willingness to provide the requested information on such a short notice.

The present research is supervised by a committee established by the Research and Documentation Centre of the Ministry of Justice. Members of this committee which convened with the researchers on 9 March 1998, were:

- Mr. D.A. Ackers, Ministry of Justice, Immigration Policy Departement
- Mr. N.D.A. Franssen, Ministry of Justice, Immigration Policy Departement
- Prof. Dr. G.S. Goodwin-Gill, professor of asylum law Oxford/Amsterdam
- Drs. E.M. Naborn (chair), Ministry of Justice, Research and Documentation Centre
- Drs P.H.W.C. Niessen, Ministry of Justice, Immigration and Naturalisation Service
- Mr. M.J. Smit, judge District Court of Haarlem.

The researchers appreciated the thorough discussions and very useful comments during the meeting in which a draft of the report before us was under consideration.

Ben Vermeulen  
Thomas Spijkerboer  
Karin Zwaan  
Roel Fernhout

## CHAPTER II. THEORETICAL ANALYSIS

### 1. Introduction

Article 1A(2) of the Geneva Convention of 28 July 1951 relating to the Status of Refugees,<sup>1</sup> as amended by the Protocol of 31 January 1967, defines a 'refugee' as any person who 'owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

The question addressed in this chapter is to what extent human rights violations by others than the State – third parties – may be regarded as persecution within the scope of article 1(A) of the Geneva Convention.

Section 2 discusses the 'standard' cases of persecution (persecution by or on behalf of the state and de facto authorities), whereas section 3 deals with the difficult cases (the state is unable to offer protection against third parties/non de facto authorities; there is no legal or de facto authority anymore).

Section 4 analyses the two main positions with regard to the problem of the agents of persecution: the accountability view, according to which persecution is somehow linked with the responsibility of the State; and the protection view, stressing that the only relevant question is whether the person involved is protected from persecutory acts whatever their source.

This chapter concludes with an analysis of the arguments for and against the two views, then seeks to reach some conclusions on which position is to be preferred (section 5).

### 2. The standard cases of persecution: persecution by the State and de facto authorities

(A) The Convention is silent on the issue of agents of persecution. However, it is uncontested that the primary source of persecution is the State and its organs. As the UNHCR Handbook observes, 'persecution is normally related to action by the authorities of a country' (para. 65). And the Joint Position of the Council of the European Union on the harmonised application of the definition of refugee<sup>2</sup> likewise declares that 'persecution is generally the act of a State organ (central State or federal States, regional and local authorities) whatever its status in international law, or of parties or organisations controlling the State' (para. 5.1).

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1 Hereafter: the Geneva Convention or Refugee Convention.

2 OJEC, 13 March 1996, no. L63.



(B) There is also a consensus of opinion in international documents, in case law and doctrine, that human rights violations by third parties condoned or tolerated by the State may amount to persecution.<sup>3</sup> According to the abovementioned paragraph in the UNHCR Handbook persecution 'may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. [...] Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.' The Joint position declares, that 'persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities' (5.2).<sup>4</sup> A situation in which the State is unwilling to afford protection will in general be regarded as persecution being 'tolerated' (UNHCR) resp. 'permitted' (Joint Position) by the authorities.

(C) There is general support, too, for the view that when systemic human rights violations are committed by a *de facto* authority, this may amount to persecution within the terms of the Geneva Convention when the State is unable to protect the individual. For instance, the Handbook observes that there may 'be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffec-

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3 Cf. article 1(1) of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...], when such pain or suffering is inflicted by or at the instigation of or *with the consent or acquiescence of a public official or other person acting in an official capacity*' (emphasis added).

4 See for decisions supporting this view: BVerwG 18 January 1994, BVerwGE 95, 42: there is persecution 'when der Heimatstaat die Verfolgung durch Private fördert oder duldet'; ABRvS 6 November 1995, RV 1995, 4: according to constant case law persecution is 'persecution by some government agent, or by others, against which the government is unwilling or unable to provide sufficient protection' ('vervolgung door enig overheidsorgaan, dan wel door derden, waartegen de overheid onvoldoende bescherming wil of kan bieden'); Conseil d'Etat 27 May 1983, AJDA 1983, p. 481: 'it does not flow from article 1A(2) of the Refugee Convention that persecution has to emanate directly from the public authorities. Persecution exercised by individuals can be taking into account when they are encouraged or voluntarily tolerated by the public authority'; Immigration Appeal Board Decision 10 August 1987, T87-10167: 'The abuse of power by agents of the State or their unwillingness to discharge their duties in respect to a particular citizen or group of citizens could indeed constitute persecution. However, to be so, such practice must be carried out systematically and with the overt or covert concurrence of the state' (P. Ariemma).

For concurring views in legal doctrine, see Grahl-Madsen 1966, p. 189; Fernhout 1990, pp. 96 ff; Hathaway 1991, pp. 125ff; Henkel 1996, pp. 22ff; Goodwin-Gill 1996, p. 71ff; Spijkerboer/Vermeulen 1997, p. 140ff; Tiberghien 1998, p. 106.

tive' (para 98). The Joint Position likewise concludes that in a civil war or internal or generalised armed conflict persecution may stem 'from de facto authorities in control of part of the territory within which the State cannot afford its nationals protection' (para. 6).

It seems that in such situations the continued existence of a State is not a necessary precondition: when the State has broken down and the persecution stems from a de facto authority without there being adequate protection in the country of origin it is often considered as persecution within the Geneva Convention. For instance, German and French case law accept the possibility of persecution by a de facto power – *staatsähnliche Herrschaftsmacht; pouvoir de fait* – (even) when State authority is absent (cf. BVerwG 15 April 1997, BVerwG 9 C 15.96; CRR 5 July 1991 (*Kaba*), CRR 4 September 1991 (*Freemans*), and CRR 30 September 1991 (*Togbah*), in *Documentation Réfugiés* no. 181, p. 4). This also is the point of view of the Dutch Council of State. In its decisions of 19 and 21 March 1997 (NAV 1997, p. 401 ff. and 405 ff.) the Council accepted the possibility that when there is a de facto government its persecutory measures may be considered as persecution within the meaning of the Geneva Convention (even though there is no longer any State in the legal sense).<sup>5</sup>

### 3. Difficult cases

There is no consensus with regard to the question how to qualify human rights violations by third parties in other cases. The following situations should be distinguished:

- (D) The human rights violations are committed by a third party which is not a de facto authority, and the (potential) victims are unprotected because the State is unable to offer protection.
- (E) The human rights violations are committed by a third party which is not a de facto authority, and the (potential) victims are unprotected because there is no State or quasi-state (anymore).

*Ad (D) Human rights violations by third parties/not being de facto authorities, while the State is unable to protect*

The Joint Position however limits in principle the concept of persecution in para. 5.2 to human rights violations by third parties that are encouraged or permitted by the authorities, and thus seems to exclude a situation of ineffective protection against third parties from the ambit of the Geneva Convention. Only in a situation of a State's incapacity to protect its citizens from persecutory acts by de facto authorities the ineffective protection may amount to persecution.

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5 This view (human rights violations by a de facto authority may amount to persecution) is also explicitly or implicitly endorsed by the writers just mentioned.

Para. 6 of Joint Position concludes that in a civil war or internal or generalised armed conflict persecution may flow ‘from de facto authorities [emphasis added] in control of part of the territory within which the State cannot afford its nationals protection’, and thus excludes – again – a situation of ineffective protection against non-de facto authorities from its scope. The Joint Position is in line with French case law (cf. Tiberghien, *Persecution by non-public agents*, p. 113), and with the jurisprudence of the *Bundesverwaltungsgericht*, according to which persecution is restricted to ‘*staatlichen oder quasi-staatlichen Verfolgung*’ (so e.g. its decision of 15 April 1997, BVerwG 9 C 15.96, thereby excluding situations in which the State is unable to provide protection against persecution by third parties/non de facto authorities). Nevertheless, according to reservations made to the text of the Joint Position, Member States who considered in the past persecution by third parties as persecution if the authorities proved to be unable to offer effective protection are still permitted to continue this ‘national judicial practice’ (see Chapter III, para. 4.2.).

On the other hand, according to para. 65 Handbook a situation where the authorities prove unable to offer effective protection against human rights violations by third parties (whether de facto authorities or not) may also amount to persecution. Dutch case law as well has endorsed the position that when the State is unable to provide adequate protection against persecution by any third party the (potential) victims can be considered as refugees, irrespective of whether this third party is a de facto authority or not. The term ‘persecution’ has been interpreted by the Dutch Council of State ‘in constant case law in such a way, that this has to be understood as: persecution by some government agent, or by others, against which the government is unwilling or unable to provide sufficient protection’ (ABRvS 6 November 1995, *Rechtspraak Vreemdelingenrecht* 1995, 4). And in the same vein the Canadian Supreme Court has ruled that ‘persecution under the Convention includes situations where the State is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens’ (Supreme Court 30 June 1993, *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689 at p. 734).<sup>6</sup>

*Ad (E) Human rights violations by third parties/non-de facto authorities, where there is no State or quasi-state*

Opinions also diverge as to the question whether in the absence of a State or a de facto authority persecutory measures committed by factions, warring parties etc. may be regarded as persecution within the meaning of the Geneva Con-

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<sup>6</sup> This view (a situation where the authorities prove unable to offer effective protection against human rights violations by third parties (non de facto authorities) may amount to persecution is accepted by the writers just mentioned, and by Marx 1995, p. 8ff.

vention. Para. 6 of the Joint Position implies that in such a case there will be no persecution. This is in line with French and German jurisprudence, and with recent decisions of the Dutch Council of State as well.

For instance the CRR has judged that in Somalia there is no persecution within the scope of the Geneva Convention because 'the fears [...] are linked to a general climate of insecurity in a country where, after the disappearance of all legal powers, clans, sub-clans and factions of the same ethnic group are fighting to create or to extend spheres of influence within the national territory, without being able to exert in those zones an organised power which could lead to regard them, eventually, as *de facto* authorities ' (CRR 26 November 1993 (*Ahmed Abdullah*), *Documentation Réfugiés* no. 237, p. 1). The *Bundesverwaltungsgericht* has argued that there is no persecution when a person is not protected against persecutory acts by third parties when 'der Staat wegen Bürgerkriegs die Gebietshoheit verloren und keine der um die Macht kämpfenden Gruppen Gebietshoheit erworben hat' (BVerwG 18 January 1994, BVerwGE 95, 42). And the Dutch Council of State has ruled that there cannot be persecution when there is no legal or *de facto* authority anymore (ABRvS 6 November 1995, RV 1995, 4; ABRvS 19 March resp. 21 March 1997, NAV 1997, p. 401 ff. and 405ff).

On the other hand, UNHCR has severely criticised this view. For instance in its comment on the decision of the Dutch Council of State of 6 November 1995, after referring to paras. 65 and 98 of the Handbook, UNHCR concludes that 'the state of civil war and complete breakdown of authority in Somalia is a clear example of a situation where a country is unable to provide protection and where an individual is therefore unable to avail himself of the protection of his country. [...] Taking the above into account, UNHCR regrets the decision taken by the Council of State since it feels that the mere fact that no government exists in a country should not in itself deprive persons from refugee status as would be the case if this ruling were to be followed' (UNHCR Position Paper with regard to persecution by non-State agents, 30 January 1996).

Furthermore, the Canadian Court of Appeal has held that the non-existence of a government cannot be an obstacle to claiming refugee status, because it would be an absurd result that the greater the chaos in a given country, the less acts of persecution could be capable of founding a claim for refugee status (decision of 30 April 1991, *Zalzali v. M.E.I.*, [1991] 3 F.C. 605 (C.A.), p. 614). Moreover, the District Court of the Hague (for appeals filed from 1 March 1994 on the new Dutch asylum judge), has expressed doubts about the reasoning of the Council of State that in case of civil war, without a legal or *de facto* authority, there cannot be a situation of persecution (District Court the Hague 11 July 1996, RV 1996, 9). Recently, a subsidiary Court in Zwolle has referred a case to the *Rechtseenheidskamer* (the coordinating chamber) of the

District Court of the Hague for a more precise ruling on this issue (Decision of 11 February 1998, Awb 97/2858 VRWET Z VS, not yet published).

In most recent publications the view is accepted that absence of (legal and de facto) authorities does not preclude a situation of persecution.<sup>7</sup>

#### 4. Two diverging views: accountability versus protection

There seem to be two different views underlying the different positions sketched in section 3 of this chapter.

On the one hand there is the 'accountability/complicity view' that there can only be persecution when the state can be held accountable for human rights violations. This position is most clearly formulated in German case law. The *Bundesverwaltungsgericht* has ruled that the Geneva Convention presumes that persecution is caused by a breach between State and individual, resulting in (the risk of) human rights violations for which the State is responsible (BVerwG 18 January 1994, BVerwGE 95, 42; BVerwG 22 March, *InfAuslR* 1994, 329; BVerwG 5 July 1994, *InfAuslR* 1995, 24). In its decisions of 19 and 21 March 1997 (NAV 1997, pp. 401ff and 405ff) the Dutch Council of State also seems to adopt this same view, and explicitly links it with the doctrine of the international responsibility of States. The logical consequence of this 'accountability' standard must be that there cannot be a case of persecution if the State is unable to provide effective protection,<sup>8</sup> if the State is not legally obliged to abstain from persecution, or if there is no State anymore.

The 'protection view' on the other hand does not regard the accountability of the State as an inherent aspect of the concept of persecution but maintains that the absence of adequate protection against persecutory measures is a sufficient condition for assuming the existence of persecution, regardless whether these measures can be imputed to the State or not. This position is correctly described (and rejected) in the decisions of the *Bundesverwaltungsgericht* just mentioned; according to the protection view

*'wird bei der Auslegung des Begriffs Flüchtling in jüngster Zeit nicht mehr am Erfordernis der staatlichen Verantwortlichkeit für die Verfolgung festgehalten. Gemeinsamer Grundgedanke dieser Entscheidungen ist, daß es zur Bejahung der Flüchtlingseigenschaft bei einer nicht vom Staat unmittelbar be-*

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7 Goodwin-Gill 1996, pp. 75-76; Fernhout/Spijkerboer/Vermeulen 1996, p. 347 ff.; Bruin 1996, p. 40 ff.; Bruin 1997, p. 359 ff.; Spijkerboer/Vermeulen 1997, p. 142; Tiberghien 1998, p. 122.

8 Cf. the Draft articles on state responsibility, Article 14, Part One, Conduct of organs of an insurrectional movement: '1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law'.

*triebenen Verfolgung nicht der 'Komplizenschaft' des Staates mit dem Verfolgenden Dritten bedarf, sondern daß bereits generelles staatliches Unvermögen, die Verfolgungsmaßnahmen des Dritten zu verhindern, ausreicht'.*

In the protection view the only relevant issue is whether the persons involved are not effectively protected against human rights violations, regardless of the source of these violations: 'the essential element for the extension of international protection is the absence of national protection against persecution, irrespective of whether this absence can be attributed to an affirmative intention to harm on the part of the state. A situation in which the state is incapable of providing national protection against persecution by non-government agents or where there has been a complete breakdown of state authority to the extent that no national protection is possible, clearly renders the individual unable to avail himself of the protection of his country of origin' (UNHCR position with regard to persecution by non-State agents, 8 August 1996).

The protection view is accepted by the Canadian Court of Appeal, which has held that the non-existence of a government cannot be an obstacle to claiming refugee status, because it would be an absurd result that the greater the chaos in a given country, the less acts of persecution could be capable of founding a claim for refugee status (*Zalzali v. M.E.I.*, [1991] 3 F.C. 605 (C.A.), p. 614). It is probably also accepted by the Dutch Courts (District Court Zwolle 8 December 1995, Awb 95/6120; District Court Haarlem 22 December 1995, Awb 95/2185; District Court of The Hague (coordination chamber) 11 July 1996, RV 1996, 9), which consider that the absence of government in itself is insufficient to reject refugee status.<sup>9</sup> In recent writings a similar view has been adopted.<sup>10</sup>

## **5. Analysis of the arguments in favour of and against the protection view and the accountability view**

Which position is to be preferred from a legal point of view? In order to answer this question it is useful first to discuss the problem of the interpretation of international treaties.

When interpreting an 'open' term (such as 'persecution') in an international treaty it is necessary to take into account the rules concerning treaty interpretation laid down in the 1969 Vienna Convention on the Law of Treaties. Although

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9 A more precise and explicit ruling on this issue will be given by District Court of The Hague (Chamber for the unity of jurisprudence) in June or July of this year, see this chapter, section 3.

10 Goodwin-Gill 1996, p. 75-76; Fernhout/Spijkerboer/Vermeulen 1996, p. 347 ff; Bruin 1996, p. 40 ff; Bruin 1997, p. 359 ff; Spijkerboer/Vermeulen 1997, p. 142; Tiberghien 1998, p. 105 ff.

this treaty is as such not applicable to interpretation of the Refugee Convention (because of its non-retroactivity, article 4 of the Vienna Convention), it may in this respect be regarded as a codification of customary law.<sup>11</sup>

The relevant provisions in question read as follows:

*‘Article 31 General rule of interpretation*

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...]*

*Article 32 Supplementary means of interpretation*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

*a. leaves the meaning ambiguous or obscure;*

*b. leads to a result which is manifestly absurd or unreasonable.’*

When applied to the interpretation of the concept of ‘persecution’ in the Geneva Convention the following conclusions may be drawn.

The term ‘persecution’ must be interpreted in accordance with its ordinary meaning to be given in the context and in the light of the object and purpose of the Geneva Convention (article 31(1) Vienna Convention). The ordinary meaning of this term – favoured by the protection view – certainly is ‘that it embraces all persecutory acts irrespective of whether or not the complicity of the state is involved’ (UNHCR position with regard to persecution by non-State agents, 30 January 1996).<sup>12</sup>

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11 I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester 1984, pp. 19 and 153; European Court of Human Rights in its decision of 21 February 1975, Publ. ECHR, Vol. A.18 (Golder), p. 14: the Vienna Convention ‘n’est pas encore en vigueur et elle précise, en son article 4, qu’elle ne rétroagira pas, mais ses articles 31 à 33 énoncent pour l’essentiel des règles de droit international communément admises [emphasis added] et auxquelles la Cour a déjà recouru’.

12 It should be noted that the *Bundesverwaltungsgericht* has admitted implicitly that the interpretation that persecution embraces only those persecutory acts for which the state is directly or indirectly responsible (the interpretation accepted in the complicity view) is not supported by the ‘ordinary meaning’ of the term (a), but only by the ‘object and purpose’ (b). The Court argued: ‘von den beiden Gesichtspunkten, die nach Art. 31 der Wiener Vertragsrechtskonvention [...] vorrangig die Auslegung eines völkerrechtlichen Vertrages bestimmen, nämlich der gewöhnlichen Bedeutung der Vertragsbestimmungen in ihrem Zusammenhang sowie Ziel und Zweck, sprechen auch Ziel und Zweck für ein Verständnis, wonach Staatlichkeit der befürchteten Verfolgung Merkmal des



Furthermore, when read in its context, in particular as part of the definition of article 1A(2) of the Refugee Convention as a whole (cf. article 31(2) Vienna Convention), this interpretation of the term 'persecution' also seems to be the most plausible. According to this definition a person is a refugee if he has a well-founded fear of being subjected to persecutory measures and is unable to avail himself of the protection of that country. Of course, the situation in which a person is unable to find protection in his country of origin is often one in which he fears persecution by third parties while his government is willing, but unable to effectively protect him. As the Handbook observes, 'being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective' (Handbook para. 98).<sup>13</sup> It is therefore not plausible to assume that a government's incapacity to protect a person against persecutory measures by a third party is not covered by the requirement that a refugee must be 'unable to avail himself of the protection of his country'.<sup>14</sup> So it can be concluded that a situation in which the government is not capable of protecting individuals against persecutory acts by third parties amounts to persecution.

However, the question whether it is possible that there can be persecution in a situation where there no longer exists any legal and/or de facto government is not yet answered. It even might be inferred from Article 1A(2) of the Refugee Convention that the concept of persecution presumes the existence of a government ('country'), which is the source of persecution or which is unable to protect the person against persecution by third parties.

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Flüchtlingsbegriffs war' (BVerwG 18 January 1994, BVerwGE 95, 42; BVerwG 22 March 1994, InfAusR 1994, 329). In other words, according to the Bundesverwaltungsgericht, its State-oriented conception of persecution is supported by the 'Ziel und Zweck', the 'object and purpose' (b), but it implicitly admits that this conception is not supported by 'der gewöhnlichen Bedeutung der Vertragsbestimmungen in ihrem Zusammenhang', the 'ordinary meaning in context' (a).

13 Although the drafters of the Refugee Convention mainly had in mind the inability to avail oneself of a government's international protection (e.g. the refusal of a passport, see UN doc. E/1618, p. 39; cf. Handbook para. 99), they also acknowledged the possibility that the government was willing but unable to protect against persecution by third parties on its territory; cf. Robinson, A/Conf.2/SR.22, p. 7-8.

14 Therefore we believe it is incorrect to limit the concept of persecution to persecution by the state or state-like powers, as does the *Bundesverwaltungsgericht*. The current position of the *Bundesverwaltungsgericht* is the more remarkable because before the 90's the German courts, basing themselves on the argument sketched just now (inability of the government to protect is one of the instances of a person's inability to avail himself of protection), concluded from incapacity of the government to protect certain groups of civilians against attacks by third parties that they were refugees (R. Marx, *Handbuch zur Asyl- und Flüchtlingsanerkennung*, Luchterhand 1995, para. 33, p. 8ff).



We believe, however, that this inference is not justified. It is not specified in Article 1A(2) that in order to qualify as a refugee in the event of persecution by third parties it is a prerequisite that there is a specific agent – a government – that is unable to protect. The relevant consideration is that the person involved is unprotected in the country of origin; it is irrelevant whether this lack of protection stems from the fact that the government itself is the persecutor, that the government is unable to protect against persecution, or that there is no government or substitute organisation to protect against persecution at all.

It has to be stressed that in case law and doctrine it has been accepted that agents other than the government, e.g. local de facto authorities, but also a clan, militia etc. can in certain circumstances be regarded as agents of protection being able to provide a person with an adequate (durable) domestic/internal flight alternative, through which he is able to avail himself of the protection of his country.<sup>15</sup> It is incompatible with this point of view – agents other than the government may count as protectors – to infer from this wording that a relevant lack of protection presupposes the existence of a government in that it should find its source in a government's incapacity to protect.

So the 'lack of protection' clause does not presuppose the existence of a government. However it has not yet been established that the concept of persecution does not necessarily imply the existence of a government. An argument in favour of the view that a situation of persecution is possible although there is no government (anymore) may be derived from a reading of article 1A(2) of the Refugee Convention in the context of articles 31(1) and 33(1) (cf. article 31(2) Vienna Convention).

Article 31(1) of the Refugee Convention provides:

*'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation' [...].*

And article 33(1) of the Convention reads:

*'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would*

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15 Joint Position section 8; De Moffarts, p. 123 ff; Fernhout/Spijkerboer/Vermeulen 1996 p. 349. In numerous decisions on Somalian cases it has been decided that protection by a clan – which cannot in general be regarded as a de facto authority – is sufficient to deny refugee status.

*be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.*

Article 33(1) must be read in the light of Article 1A(2): it forbids refoulement, that is, the expulsion or return of a refugee to territories where he has a well-founded fear of persecution (Goodwin-Gill 1996, p. 138). Article 33(1) does not specify the agent that threatens the person’s life or freedom, seems not to demand that this threat emanates from a public authority, seems not to require that there is a government that is the source of persecution or incapable to protect against persecution. It appears to be sufficient that the threat of a human rights violation is linked to one of the persecution grounds. Likewise article 31(1) merely requires that a refugee directly flees a territory where his life or freedom is threatened on account of one of the grounds mentioned in article 1A(2), irrespective of the source of this threat.

Of course this argument is in itself not conclusive, while articles 31(1) and 33(1) presume the concept of refugee as defined in article 1, they do not themselves define this concept. They are limited to the issue of non-refoulement. Nevertheless, the language of articles 31(1) and 33(1) suggests that the framers of the Refugee Convention, when employing the concept of fear of persecution, had in mind the threat of (severe) human rights violations regardless of their source.

Furthermore, this liberal interpretation of the definition of refugee – that persecution may take place even when no government exists (anymore) – is warranted when we take into account ‘the object and purpose’ of the Geneva Convention (article 31(1) Vienna Convention), as well as the Preamble (article 31(2) Vienna Convention). The primary object and purpose of the Refugee Convention is of course ‘to solve refugee problems in a human rights spirit’ (Kälin, *IJRL* 1991, p. 447), as is also clear from the Preamble. The Preamble refers to the UN Charter and the Universal Declaration of Human Rights that ‘affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’, and considers ‘that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement [...]’.

The object and purpose of the Refugee Convention, which is to safeguard persons from severe human rights violations, is a strong argument in favour of a liberal interpretation of its scope, which implies a broad interpretation of the term ‘persecution’. A restrictive interpretation, according to which individuals fleeing from the threat of persecution by non-state agents would be ex-

cluded from the recognition as a refugee for the sole reason that there is no government in their country, is contrary to this object and purpose.<sup>16</sup> As the UNHCR note of March 1995 on Agents of persecution observes, 'the letter, object and purpose of the Convention would be contravened and the system of international protection of refugees would be rendered less effective if it were to be held that an asylum seeker should be denied protection unless a State could be accountable for the violation of his/her fundamental human rights by a non governmental actor'.<sup>17</sup>

Proponents of the accountability view in general rely on historical arguments. The Bundesverwaltungsgericht in particular stresses that the framers of the Convention only had in mind a limited category of refugees; and that their concept of persecution implied a breach between the state and the individual, and thus presumed the responsibility of the state (BVerwG 18 January 1994, BVerwGE 95, 42; BVerwG 22 March, *InfAuslR* 1994, 329; BVerwG 5 July 1994, *InfAuslR* 1995, 24).

For several reasons such a historical reading of the Convention cannot be conclusive. First, the historical interpretation is only a subsidiary means of interpretation, that – when not used to confirm the meaning consistent with article 31 of the Vienna Convention (which is the case here) – should only be used when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable (article 32 of the Vienna Convention). Neither (a) nor (b) is the case.

Furthermore, the *travaux préparatoires* do not say much concerning the agents of persecution. It is accepted that the framers, when discussing the refugee concept, had in mind human rights violations by the state or its organs as the standard model of persecution. But this does not imply that they wanted to exclude from the refugee definition persecution by non-state agents: at that time they did not have to address that problem at all. It should be recalled that the framers only addressed themselves to the problems of a limited category of refugees, that is, those fleeing because of events before 1 January 1951. These events were primarily the persecution by the Nazi-regime and the rise of Communist regimes in Middle and Eastern Europe, and thus necessarily linked to actions by states; and because of article 1B of the Convention a contracting State could limit its responsibility to European refugees and thus to those persons fleeing these events.

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<sup>16</sup> In the same vein: the UNHCR position with regard to persecution by non-State agents, 30 January 1996.

<sup>17</sup> Cf. Fernhout/Spijkerboer/Vermeulen 1996, p. 348-349.

We submit that this case law of the *Bundesverwaltungsgericht* should not be used in order to argue that the concept of persecution in the Geneva Convention presupposes some kind of State accountability/complicity. This case law projects the German constitutional concept of persecution, which indeed presumes state complicity, onto treaties such as the Geneva Convention and the European Convention on Human Rights. A case in point is the decision of the *Bundesverwaltungsgericht* of 14 April 1997, BVerwG 9 C 38.96. Quoting the decision of the European Court of Human Rights of 17 December 1996 (Ahmed vs. Austria, RV 1996, 21) the *Bundesverwaltungsgericht* held: 'Als unmenschliche Behandlung gemäß Art. 3 EMRK sind deshalb grundsätzlich nur Mißhandlungen durch staatliche Organe anzusehen'. However, this is in contradiction with the European Court's ruling that the conclusion that Ahmed's expulsion to Somalia was contrary to article 3 of the European Convention was not invalidated 'by the current lack of State authority in Somalia'.<sup>18</sup> This reading by the German Court of the Ahmed decision makes it clear that it interprets international human rights concepts such as 'persecution', 'prohibition of inhuman treatment' etc. from a national point of view, determined by the German constitutional concept of refugee.

In sum, there are strong arguments in favour of the protection view, whereas the historical arguments on which the accountability view mainly rests are inconclusive. Moreover, there are also some arguments against the accountability view.

According to this view there can only be persecution when the receiving state can be held responsible for persecutory measures. For several reasons this view should not be endorsed.

First, the Geneva Convention is a human rights treaty, not a treaty on state responsibility. As Henkel correctly observes:

*'It is not the purpose of the Convention to judge the country of origin or to establish its responsibility. The sole purpose is to provide protection to those in need of it [...]. State responsibility is only of importance if a State is asked to be called to account for an action contrary to international law. Hence, it generally plays a role only in cases in which a State is asked to make reparations or to give satisfaction. The Geneva Refugee Convention, however, does not address the question of reparations to be made by the country of origin. It*

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18 Cf. also ECHR 2 May 1997, RV 1997, 19 (*D. vs. United Kingdom*): the Court is not prevented 'from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country' (emphasis added).

*does not even blame countries because of their inability to provide effective protection. Instead, it simply tries to secure that refugees do not have to suffer the consequences of the lack of protection by their country of origin' (Henkel 1996, p. 23).*

To exclude the applicability of the Refugee Convention from situations in which no government exists, reduces the Refugee Convention to an *intergovernmental* agreement only and denies its origin as an international instrument for the protection of human rights. In international human rights law not only the States but also individuals have subjective rights, independently of the State of their nationality, even as regards international protection against that State. The same is true for the refugee as a subject of international refugee law, with subjective rights independently of the State of nationality, who is entitled to protection against that State, irrespective of the fact whether in the State of nationality a legal government still exists or not.

Secondly, a consequence of the 'accountability' standard is that there cannot be persecution if the receiving State is unable to provide effective protection (because in that case the State is not accountable), or if there is no longer any State (there is no State that can be held accountable). In sum 'qualifying as a refugee would be conditional on the rules of attribution, and protection would be denied in cases where, for any reason, the actions of the persecutors were not such as to involve the responsibility' (Goodwin-Gill 1996, p. 73).

One of the purposes of the rules regarding state responsibility seems to be to hold a state accountable for its human rights violations. We believe that these rules are misconstrued when they are adduced as an argument to limit the scope of a treaty that intends to oblige states to provide persons (substitute) protection against human rights violations.

Thirdly, a logical consequence of this view is that there cannot be persecution when the State is not a party to the human rights treaties and therefore not legally bound not to persecute (and its persecutory acts are not in breach of obligations *erga omnes* either). We cannot believe that the proponents of the accountability view have this in mind.

Fourthly, the proponents do not consistently apply the accountability standard. For instance the Dutch Council of State includes situations of a State's inability to protect in the concept of persecution, whereas the State will in general be held unaccountable for this inability. Furthermore, the Council of State as well as the Bundesverwaltungsgericht accept the possibility of persecution by *de facto* authorities, whereas neither the legal state nor these *de facto* authorities

can be held accountable for their persecutory actions on the basis of the principles of state responsibility.<sup>19</sup>

Finally, a problem caused by the accountability thesis is that qualifying a person as a refugee would automatically imply that the state of origin is held responsible by the asylum state for human rights violations amounting to persecution. This disregards that the asylum has always been seen as a matter to be viewed separately from criticism of the state of origin. The granting of asylum is not in itself an unfriendly act, and should not be construed as a censure of the government of the state of the asylum-seeker (Grahl-Madsen 1980, p. 12-13; Spijkerboer 1997, p. 1506).

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19 Cf. the following paragraphs of the Draft articles on state responsibility (which can be regarded as customary law):

‘Article 14, Part One, Conduct of organs of an insurrectional movement:

1. The conduct of an organ of an insurrectional movement which is established in the territory of State or in any other territory under its administration shall not be considered as an act of that State under international law’ [...]. Article 15, Part One, Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State’ [...].

## CHAPTER III. COMPARATIVE ANALYSIS

In this section, we will focus on the central issue of this report: the origins of persecution. However, as this issue does not exist in a void, it is useful to address the topics to which it is most directly related, most notably the issue of agents of persecution.

It should be noted that the following is based on the replies from our respondents to a questionnaire. Both the questionnaire and the country reports based on the replies are published as annexes. The country reports have been corrected by at least one respondent. Although – where possible – we have analysed the relevant texts (predominantly court decisions) ourselves, we were unable to review all relevant texts in the short period during which we carried out this research. Also, in many cases we had to rely on informal citations of case law, or we had access to original versions and not the published ones; this has no doubt led to odd citations although we have done our very best to make the cases we refer to identifiable. Although we assume full responsibility for the analysis that follows, we want to indicate that we are no wiser than our respondents, on whom we depended for our factual information.

### 1. Agents of persecution

#### 1.1. Persecution by third parties

A first question is whether acts by agents other than State organs can qualify as persecution. In other words: for recognition as a refugee does the immediate perpetrator of persecutory acts have to be a State agent? On this point, three positions can be distinguished.

The first position, now abandoned in all countries covered in this research, is that all requests based on acts emanating from private (non-State) groups, whether organised or not, are to be rejected. This line was followed in France until 1979, when the Refugee Appeals Board (CRR) recognised that ill treatment organised by a section of the population and tolerated by the government could constitute persecution.<sup>20</sup> In Sweden as well, full refugee status was reserved for applicants having a well-founded fear of persecution emanating from State organs, until the Act of 10 December 1996 (entry into force 1 January 1997) stipulated that acts of private individuals against which the authorities cannot be expected to offer protection can result in persecution as well. Therefore, the conclusion has to be that the idea that acts of non-State actors

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<sup>20</sup> CRR 3 April 1979, case of *Duman*, Amnesty International and France Terre d'Asile 1997, p. 44.

can never constitute persecution has been abandoned in the jurisdictions under review in this study.

A second position on the relevance of persecution by non-State actors holds that this can only lead to recognition as a refugee if the State is in some way complicit in these acts, most notably by encouraging or tolerating them. Such encouragement or toleration of persecution by third parties is often characterised as 'indirect persecution'. In two of the eight countries covered in this report a version of this position is upheld.

Thus, in France the 1979 Duman decision already referred to was followed by a decision holding that persecution does not necessarily have to emanate from the authorities. Persecutory acts committed by private persons, organised or not, can be relevant provided these are effectively encouraged or tolerated by the public authorities to the effect that the person concerned cannot effectively invoke protection against such acts.<sup>21</sup> According to this line of jurisprudence, it appeared that agents of persecution could be a rival separatist group,<sup>22</sup> an opposing political party,<sup>23</sup> a para-governmental militia in Colombia,<sup>24</sup> a political organisation<sup>25</sup> and even an influential family;<sup>26</sup> in all these cases the activities of the agents had been tolerated or encouraged by the public authorities. As a result of the requirement of encouragement or toleration, groups that the public authorities are combating cannot be agents of persecution. Thus, applicants who have a well-founded fear of acts committed by diverse entities such as Sendero Luminoso in Peru, the F.I.S in Algeria and the Tamil Tigers in Sri Lanka cannot be recognised as refugees. In an Algerian case, the French Council of State ruled that, as any encouragement or voluntary toleration of terrorist activities was absent, the Algerian government's incapacity to provide effective protection against terrorist acts was immaterial.<sup>27</sup>

In Swiss case law, persecution by the State is the central concept. Persecution by others is only seen as relevant for recognition as a refugee if it can either be traced back to the State, or if the persecutor can be equated to a State. Persecution by third parties is seen as in fact State persecution in situations where the State fails to protect its citizens, by encouraging, supporting or justifying acts of violence, or by remaining passive because it lacks the will to protect the population group thus targeted (so-called indirect State persecu-

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21 CE 27 May 1983, case of *Dankha*, AJDA 1983, p. 481.

22 CRR 11 February 1991, case 155.818.

23 CRR 3 July 1992, case 225.170.

24 CRR 10 February 1995, case 264.759.

25 CRR 10 November 1993, case 240.429.

26 CRR 30 June 1995, case 281.347.

27 CE 22 November 1996, case 167.195.



tion).<sup>28</sup> Persecution is seen as equal to State persecution when it emanates from a rebel group which exercises permanent and effective control over its territory (which is then characterised as a quasi-State persecutor).<sup>29</sup> If persecution is neither indirect State persecution nor quasi-State persecution, it cannot lead to recognition as a refugee. This means in effect that, where a State's failure to protect against acts of third parties is based on inability (as opposed to some variety of unwillingness) this cannot give rise to successful claims to refugee status. Thus, acts from Islamist groups in Algeria are immaterial for refugee status because the Algerian authorities are fundamentally willing to provide protection against them.<sup>30</sup>

The third position of non-State persecutors holds that State complicity is, simply, not required. In this view, persecution can be direct State persecution, indirect State persecution or quasi-State persecution in the sense of the Swiss case law, or persecution by others provided that the claimant cannot get effective protection against it. This third position is applied in Sweden, Canada, the United Kingdom, The Netherlands, and in a strongly qualified version in Germany.

The clearest example of this is apparent in the (as of 1 January 1997) revised Swedish Aliens Act. After giving the familiar definition of a refugee, Chapter 3, Section 2 stipulates that this definition 'applies' irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by private individuals.' In Canada, the Canadian Supreme Court decision in the *Ward* case held in short that State complicity is not required for persecution within the meaning of the refugee definition.<sup>31</sup> It does not matter what the source of persecution is; the issue is whether an applicant can obtain protection against it. There is however a general presumption that protection against acts of third parties will be forthcoming. Unless there is an admission by the claimant's State that it cannot afford protection, the claimant must submit clear and convincing information of a State's inability to protect. Protection must be adequate, though not necessarily perfect.<sup>32</sup> Since no government that makes any claim to democratic values or protection of human rights can guarantee the protection of all its citizens at all times, it is not enough that the claimant merely shows that his government has not always been effective at protecting persons in his particular situation. Where a State is in effective control of its territory, has military,

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28 ARK 11 March 1996, I/N 250 200; comp. CRA 7 December 1992, JICRA 1993, no. 9.

29 ARK 29 June 1995, EMARK 1995, no. 25.

30 ARK 6 June 1996, EMARK 1996, no. 28.

31 *Attorney-General of Canada v. Ward* [1993] 2 SCR 689, 103 D.L.R. (4th) 1.

32 FCA 30 April 1991, FCJ 1991, no 341.

police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to provide themselves of such protection.<sup>33</sup>

The United Kingdom case law initially followed the second point of view. In Algerian cases the Home Office decided that persecution by armed opposition groups could not be deemed persecution as the Algerian government had done it best with the resources available to protect its citizens. The first instance court ruled that for persecution it is necessary that the State gives some measure of implicit approval to persecution by non-State agents for international protection to be warranted.<sup>34</sup> But in line with its earlier case law<sup>35</sup> the Immigration Appeal Tribunal in the Yousfi case ruled that '(t)he real question is not whether the State authorities are doing the best they can in all the circumstances, but whether viewed objectively the domestic protection offered by or available from the State to the appellant is or is not reasonably likely to prevent persecution. (...) are the Algerian authorities able to provide effective protection against the GIA?'<sup>36</sup> After this decision, according to NGO's the Home Office has adapted its position to the IAT line.

In Dutch case law, acts of third parties are considered as persecution if the State is unwilling or unable to provide effective protection against it. In a number of decisions in cases of Sri Lankan Tamils, the Council of State seemed to hold that a State's inability to protect immediately does not imply persecution.<sup>37</sup> In a subsequent decision, the Council explained that in cases where effective protection was absent during a short period only, this in itself was insufficient to establish persecution.<sup>38</sup> However, in later case law of the Council of State, the Supreme Court and the District Courts the issue is absent. As a consequence, the conclusion must be that the duration of a State's inability to protect is not an independent variable in determining refugee status.

Germany is a different case, as it is in between the second and the third category. In German case law, persecution (both in the sense of article 16a of the Constitution and in the sense of Paragraph 51 of the Aliens Act) 'is fundamentally State persecution.'<sup>39</sup> Persecution can consist of either direct persecution (i.e. acts perpetrated by State organs) or indirect persecution, i.e. sit-

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33 FCA 18 December 1992, FCJ 1992 no. 1189, 18 *Imm.L.R.* (2d) 130 in the case of *Villafranca*.

34 *Sangha*, SSHD 02-02-1996, *ImmAR* 1996, 493.

35 E.g. IAT 10 December 1991, case 8405.

36 Feb. 1996, unpublished.

37 ARRvS 24 February 1988, RV 1988, 4, AB 1988, 271, GV (oud) D12-143.

38 ARRvS 2 August 1988, RV 1988, 5, GV (oud) D12-149.

39 BVerfG 10 July 1989, BVerfGE 80, 315; BVerwG 18 January 1994, C 48.92.

uations in which, despite its ability to intervene, the State fails to prevent persecution organised by private individuals against a group.<sup>40</sup> This position would put German case law firmly in the second category, as in this view only acts for which the State is to some extent responsible can constitute persecution. However, in a decision from 1994 the Federal Administrative Court ruled that acts by third parties can also constitute persecution when the country of origin is in general unable to prevent them.<sup>41</sup> As a consequence, the precise line of German case law is unclear.

The state of affairs in Italy is unclear. Although NGOs report that many claims based on persecution by third parties are rejected, it seems that such claims are not bound to fail as a matter of principle. In a recent decision in a Peruvian case, in which Sendero Luminoso was the agent of persecution, the rejection was based on an individual argumentation.<sup>42</sup> This suggests that persecution by an agent against which the authorities are willing, but unable to provide protection may lead to recognition as a refugee.

## **1.2 Internal flight alternative**

In Dutch and German case law, the concept of the internal flight alternative was developed in cases concerning persecution by third parties (these cases concerned persecution of Christians in Eastern Turkey).<sup>43</sup> It is therefore of interest to see how the connection between the respective positions on agents of persecution relate to the internal flight alternative.

In France and Italy the concept of the internal flight alternative does not play a significant role. Our respondents in Italy were not aware of any application of the principle in individual cases, while French respondents indicated that whether or not an applicant can be safe in another part of the country of origin is seen as only one factor among others in determining refugee status. Of course this is the case in other jurisdictions as well, but this reply indicates that in France the internal flight alternative has not been developed into a separate doctrinal issue, as it has in other countries. The line in Sweden is unclear; the new Aliens Act mentions the internal flight alternative, but our respondents indicated that as yet they have to gain experience with its operation in practice.

In the six other countries, if a claimant can live free from persecution in another part of the country of origin he will not be recognised as a refugee. The concept of the internal flight alternative is about two issues:

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40 BVerwGE 62, 123; BVerfG 2 July 1980, BVerfGE 54, 341.

41 BVerwGE 95, 42, see also Chapter III, par. 3.

42 Case reported to us by Amnesty International, see Country report.

43 See i.a. ARRvS 18 August 1978, RV 1978, 30, AB 1979, 159, GV (oud) D12-16; BVerwG 2 August 1983, 9C 600.81.

1. The claimant should be safe in the area designated as the area of alternative residence. The precise words differ from jurisdiction to jurisdiction. Thus, Swiss case law refers to 'effective protection from persecution', which is explicitly said to be a more strict criterion than the one concerning the well-founded fear of persecution.<sup>44</sup> Some UK case law uses comparable terminology (safe from persecution, effective protection<sup>45</sup>). Other UK case law,<sup>46</sup> as well as case law in Canada,<sup>47</sup> Germany<sup>48</sup> and The Netherlands<sup>49</sup> uses terminology suggesting that, in the case of a potential internal flight alternative, it is sufficient that the applicant has no well-founded fear of being persecuted in that alternative area as well. This makes the criterion for applicability of this exception less stringent compared to the stricter position in Swiss and some UK case law.
2. The applicant must be able to live in the alternative area under reasonable circumstances; these circumstances should not be unduly harsh. Case law in all jurisdictions that recognise the internal flight alternative as a separate doctrinal issue is unanimous in finding mere deterioration of living standards insufficient grounds for deeming the living circumstances unreasonable.<sup>50</sup> A rare example of a case in which the living circumstances in a safe other area of the country of origin were considered unduly harsh is that of a Ghanaese trade unionist, who according to the Tribunal could not be expected to relocate to a remote village where he would be cut off from his wife and unable to pursue his employment as a trade unionist as he had done for thirty years.<sup>51</sup> In some decisions, the (obvious) criterion that a

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44 CSRA 28 November 1995, JICRA 1996 no. 1.

45 *Daniel Boahin Jonah*-case, IAT 11-01-1985, *ImmAR* 1985, 7, *Robinson* decision, *The Times* 1 August 1997.

46 Queens Bench Division 15 January 1997, CO/2503/95.

47 FCA 5 December 1991, FCJ 1991 no. 1256 in the case of *Rasaratnam*; FCA 10 November 1993, FCJ 1993 no. 1172 in the case of *Thirunavukkarasu*: no serious possibility of the claimant being persecuted in the alternative part of the country.

48 BVerfG 10 July 1989, BVerfGE 80, 315: part of the country where the applicant can live without a well-founded fear of being persecuted.

49 ARrvS 18 August 1978, RV 1978, 30, AB 1979, 159, GV (oud) D12-16: possibility to settle elsewhere in the country without exposure to acts against which the authorities cannot grant protection; ABRvS 21 September 1994, RV 1994, 7: possibility to avoid persecution by settling elsewhere in the country.

50 CSRA 28 October 1993, JICRA 1993, no. 37; CSRA 28 November 1995, JICRA 1996 no. 1; FCA 5 December 1991, FCJ 1991 no. 1256; FCA 10 November 1993, FCJ 1993 no. 1172; BVerwG 24 March 1995, BVerG 9 B 747.94; *Robinson* decision, *The Times* 1 August 1997; ARrvS 18 August 1978, RV 1978, 30, AB 1979, 159, GV (oud) D12-16; ARrvS 14 June 1988, GV (oud) D12-155.

51 *Daniel Boahin Jonah*, IAT 11-02-1985, *ImmAR* 1985, 7.

claimant must be able to reach the alternative region without undue hardship as well is made explicit.<sup>52</sup>

### **1.3 Agents of persecution and internal flight alternative**

On the question whether the applicability of the concept of the internal flight alternative is related to the nature of the agent of persecution, three positions can be distinguished.

Canada and Germany are the two most restrictive countries in this respect. The exception of the internal flight alternative can be applied irrespective of the agent of persecution. This implies that even in cases of persecution by the central authorities an alternative part of the country of origin may be deemed safe, and that it may be found reasonable to expect claimants to relocate in such another part of the country of origin.<sup>53</sup>

The second position, taken in France, Switzerland<sup>54</sup> and the Netherlands,<sup>55</sup> holds that an internal flight alternative cannot be invoked when the persecution emanates from the central authorities. This implies that the concept can only be applied in cases of persecution by local authorities or third parties.

The third position, taken in the United Kingdom,<sup>56</sup> holds that the internal flight alternative is only relevant when the persecutor is a third party, unless it can be shown that the State's mandate does not run to the whole of the territory nominally under its control.

### **1.4 Summary**

If we combine the data on this point, we can distinguish five different positions. Italy and Sweden have been left out because the data are inconclusive on this point.

The most liberal position is taken by the United Kingdom. It considers acts of third parties as persecution if the State is unwilling or unable to grant protection, and it applies the concept of the internal flight alternative only in cases of persecution by third parties. Thus, as the only country covered in this research it combines the liberal position on the points of agents of persecution and the internal flight alternative.

The most liberal position but one is taken in Dutch case law. Third party acts against which the State is unwilling or unable to grant protection are con-

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52 BVerwG 13 May 1993, NVwZ 1994, p. 1210; FCA 5 December 1991, FCJ 1991 no. 125 and FCA 10 November 1993, FCJ 1993 no. 1172.

53 FCA 22 March 1993, A-750-91 in the case of *Saini*.

54 ARK 28 November 1995, EMARK 1996, no. 1.

55 ARrvS 8 June 1993, GV (oud) D12-232; ABRvS 6 December 1994, no. R02.92.4410 (not published).

56 Home Office.

sidered persecution (liberal position on the point of agents of persecution), but the internal flight alternative can be invoked in cases of persecution by third parties or local authorities (middle position on the point of the internal flight alternative).

Canadian case law takes a position hard to relegate to a place on a liberal-restrictive scale, as it combines the liberal position on the issue of agents of persecution (both unwillingness and inability to grant protection are relevant) with the most restrictive position on the issue of the internal flight alternative (exception may be applied irrespective of who the persecutor is).

France and Switzerland also have an unclear position on the scale. They recognise acts by third parties only as relevant if the State is unwilling to protect (restrictive position on the point of agents of persecution), and apply the internal flight alternative in cases of persecution by third parties or local authorities (middle position on the point of the internal flight alternative).

Germany takes the most restrictive position. It takes the restrictive position on both the point of agents of persecution (apart from the puzzling 1994 decision referred to above) and on the point of the internal flight alternative. Thus, acts count only if there is some State complicity and the internal flight alternative can be applied even if the central authorities are the perpetrators of persecution.

## **2. Break down of governmental authority**

### **2.1 Persecution after break down of governmental authority**

On this point, two positions can be distinguished. One holds that, as persecution presumes State complicity, when the State has ceased to exist there can be no such complicity and consequently no persecution. The other position finds the existence of governmental authorities in the country of origin not decisive for determining refugee status. This relatively clear picture is complicated by conflicting Dutch case law.

German case law during the last decade has ruled that the concept of persecution (both in the sense of article 16a of the Constitution and in the sense of paragraph 51 of the Aliens Act) refers to State persecution. According to the Constitutional Court the concept of State persecution presupposes that there is effective State authority over the territory.<sup>57</sup> Such State authority is lacking in the event of a civil war,<sup>58</sup> and in countries in which there is no government or the

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<sup>57</sup> BVerfG 10 July 1989, BVerfGE 80, 315.

<sup>58</sup> BVerwG 21 January 1992, BVerwGE 89, 296.

government is not effectively in control of the country.<sup>59</sup> An exception to the rule that in the event of a civil war no State persecution is possible is made in situations where, although the State forces are only a party to the civil war and consequently only have the role of one of the warring factions, State forces resort to physical annihilation of opponents on account of one of the persecution grounds.<sup>60</sup>

In Swiss case law, the reasoning is likewise that there has to be at least indirect State responsibility for persecution; and when the State has ceased to exist in the country of origin, there can be no persecution.<sup>61</sup> There is no case law of the French Council of State on this point. Its *Dankha* decision, requiring minimally indirect State complicity,<sup>62</sup> would suggest that it does not accept the possibility of persecution after break down of State authorities. The first instance Refugee Appeals Board has ruled accordingly.<sup>63</sup>

The second position maintains that, as no State complicity is required for persecution to be established, it is not decisive whether there is a functioning State apparatus, but whether claimants can get effective protection against persecutory acts. The Swedish legislative proposal stipulating that third parties could be agents of persecution explicitly mentioned that the widened definition of the term refugee (in force as of 1 January 1997) also allows the possibility to consider claims to refugee status based on persecution in a country without a government. Our Italian respondents concluded that Italian administrative practice does not require an effective government per se, as the claims of Albanians after the collapse of the Berisha government were mostly rejected, but not on the ground that there was no effective government.

Thus, in Canadian case law applications by claimants from Lebanon<sup>64</sup> and Somalia<sup>65</sup> are adjudicated just like those from other countries. Of course, the specific situation in such countries does give rise to particular problems. In a situation where there is no effective government, all persecution is persecution by third parties. The question then arises whether entities holding actual power can be deemed as entities able to provide protection against persecution by third parties. In other words: can one third party provide relevant protection against persecution by another third party? Canadian case law has answered this ques-

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59 BverwG 18-01-1994, BVerwGE 95, 42, NVwZ 1994, 497, *InfAuslR* 1994, 196; BverwG 22-03-1994, NVwZ 1994, 1112, *InfAuslR* 1994, 329; BVerwG 15 April 1997, *InfAuslR* 1997, 379.

60 BVerfG 10 July 1989, BVerfGE 80, 315.

61 CSRA 29 June 1995, JICRA 1995 no. 25.

62 CE 27 May 1983, case of *Dankha*, AJDA 1983, p. 481.

63 I.a. CRR 26 November 1993, case 229.619; CRR 28 February 1995, case 270.619.

64 *Salibian v. MEI*, FCA 24 May 1990 FCJ 1990, no. 454; *Zalzali v. MEI*, FCA 30 April 1991, FCJ 1991 no. 341.

65 *Sami*, FCA 1 June 1994 FCJ 1994 no. 825.



tion in the affirmative. The Somali National Movement could according to one decision be seen as the de facto government controlling the north of the country (Somaliland). Although not internationally recognised it would nevertheless be able to provide protection to the claimant in that particular case.<sup>66</sup> Likewise, the issue came up whether the Lebanese government, which is heavily influenced by the Syrians, could grant relevant protection. This question was also answered affirmatively. The precise power relations in Lebanon were not seen as decisive; the Lebanese government's ability to guarantee the needed protection was.<sup>67</sup>

In the UK, despite one isolated IAT decision holding that as there was no State in the claimant's country of origin there could be no persecution, case law holds that claims from e.g. Somalia and Bosnia-Herzegovina can be successful if it is established that non-state perpetrators commit persecutory acts and that the State's protection mechanisms have become dysfunctional.<sup>68</sup>

The Dutch case is unclear, both as there is conflicting case law and because one of the two positions is inconsistent with Dutch case law on agents of persecution. Until 1995, Dutch case law followed the second, liberal line and focused on the availability of protection against persecutory acts. Whether or not there was a central government was not decisive. Thus, in a Lebanese case the Council of State in 1984 ruled that the fact that the Lebanese government was unable to effectively protect its citizens against the mutually warring groups in itself was insufficient for refugee status – thus implying that refugee status was not out of the question.<sup>69</sup> Comparably, cases from Liberia after the demise of the Doe government were adjudicated on a case by case basis.<sup>70</sup> And initially, in cases concerning Somalia after the expulsion of Siad Barre in 1991 the Council of State followed the same line.<sup>71</sup>

However, in a decision of 6 November 1995 the Council of State changed its position.<sup>72</sup> In short it stuck to its position that persecution may be perpetrated by either State organs, or by third parties against which the State is unwilling or unable to grant protection. It ruled however that there can be no persecution if in the country of origin there is no government. The Council of State claims that its position is in line with case law in France and Germany, which are parties to the Schengen Agreement. In two later decisions, the Council of State re-

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66 *Sami*, FCA 1 June 1994 FCJ 1994 no. 825.

67 *Chebli-Haj Hassam*, FCA 28 May 1996, FCJ 1996 no. 753.

68 CA 13 Februry 1997, *The Times* 7 March 1997.

69 ARRvS 31 January 1984, GV (oud) D12-99.

70 ABRvS 221 September 1994, RV 1994, 7; ABRvS 21 September 1994, RV 1994, 8.

71 ABRvS 14 April 1994, GV 18a-5; ABRvS 14 April 1994, GV 18a-6; ABRvS 30 January 1995, GV 18d-5.

72 ABRvS 6 November 1995, RV 1995, 4.



peated its position and gave further explanation.<sup>73</sup> It repeated its position on agents of persecution. It ruled that no persecution is possible in a situation where every form of factual governmental authority is lacking.

The Council of State is the highest court in asylum cases where an appeal was filed before 1 March 1994. In cases where the appeal was filed after that date, the District Court in the Hague is the highest court. A further complication is that the District Court up to now has refused 'for the moment' to follow the line laid down by the Council of State. After a recent referral by a subsidiary court in Zwolle (decision of 11 February 1998, Awb 97/2858 VRWET Z VS, not yet published) a more precise ruling on the issue by the District Court in The Hague is expected. At least for the moment there seems to be a conflict between two courts of equal importance, the Council of State and the District Court in the Hague.<sup>74</sup> The conflict may be solved in the future, as on 22 December 1997 the government introduced a bill proposing to make the District Court in the Hague the court of first instance in asylum cases, and the Council of State the appeals court.<sup>75</sup> This would suggest that in the end the position of the Council of State would prevail.

## 2.2 Countries of origin in which governmental authority is deemed to have broken down

The picture was relatively clear up to here. It gets more complicated when we investigate the restrictive jurisdictions more closely as to the practical effects of their case law. Claimants from which countries of origin are excluded by the rule that if there is no government there can be no persecution?

In Canada,<sup>76</sup> the United Kingdom,<sup>77</sup> Sweden, Italy<sup>78</sup> and the Netherlands in the version of the District Court,<sup>79</sup> this issue is not relevant. In the other coun-

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73 ABRvS 19 March 1997, RV 1997, 2 and ABRvS 21 March 1997, NAV 1997, p. 405-409.

74 District Court The Hague (REK) 11 July 1996, RV 1996, 9.

75 TK 1997-1998, 25 829, nrs. 1-2

76 E.g. *Zalzali v. Canada (MEI)* [1991] FCJ No. 341: 'Just as a state of civil war is no obstacle to an application for refugee status, so the non-existence of a government [i.e. in Lebanon] equally can be no obstacle.' Comp. *Sami v. Canada (MEI)* [1994] FCJ No. 825.

77 E.g. *Hassan Hussein Adan et al. v. Secretary of State for the Home Department* [1997] Imm AR, 251, in which the break down of the central government in Somalia is not seen as inhibiting a normal assessment of the asylum claim. Comp. *Mustapha Khaldoun v. Secretary of State for the Home Department* [1996] Imm AR, 200 on Algeria and *T. v. Secretary of State for the Home Department* [1996] Imm AR, 443.

78 E.g. Commissione Centrale per il Riconoscimento dello Status di Refugiato 18 November 1997, in which a Liberian applicant is recognised as a refugee in view of the instable situation in Liberia.

tries and the Netherlands in the version of the Council of State, it is. The positions vary however.

The French administration (OFPRA) has decided that claimants from Somalia, Liberia and Algeria are excluded from refugee status. The Refugee Appeals Board has confirmed this in Somalian cases.<sup>80</sup> The French Refugee Appeals Board reasoned that the fears expressed by the applicants were connected to the general insecurity in Somalia, where after the demise of all legal authority, clans, sub clans and factions of one single group were fighting in order to create or expand their sphere of influence within the national territory, without however exercising organised power which could be ground for regarding them as *de facto* authorities. No exact periodization is given. In Swiss case law, Somalia is excluded.<sup>81</sup> The Swiss Refugee Appeals Board ruled that since 1988 the power of the regime of Siad Barre gradually withered away, and at great length describes the course of events in Somalia. It then concludes that the events the applicants experienced were not inflicted by State organs exercising public authority that are constitutive elements of the State, nor by quasi-State organs, because no clan or movement at the time (March 1991) exercised *de facto* control. In Germany, Somalia is seen as a country without a government from the breakdown of the government of Siad Barre in January 1991 until now. In Liberia no government is deemed to exist from the start of the civil war in December 1989 until now. In Afghan cases the government is deemed to have broken down in April 1992 (fall of Najibullah) and has not been restored since. In Dutch case law, the Somali government is seen as non existent from the fall of the government of Siad Barre until now.<sup>82</sup> According to the Dutch Council of State, in Afghanistan a power vacuum came into existence on 16 August 1992, when the interim government of Islamic resistance movements fell apart; this vacuum has not been repaired since.<sup>83</sup> The Dutch Council of State has not found other countries to lack a government. Applicants from, e.g., Liberia and Algeria can be, and still are recognised as refugees in the Netherlands.

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79 Thus, the District Court took substantive decisions in Somalian cases (with varying outcomes), Rb. Den Haag (REK) 11 July 1996, RV 1996, 9, GV 18a-16; also GV 18a-17 and GV 18a-18. Comparably, the President of the County Court did not consider the asylum applications of a group of Afghans as unfounded because of the lack of a government in Afghanistan; as a result, the applicants's transfer to Germany in accordance with the Schengen Implementation Agreement was blocked, Pres. Rb. Den Haag, zp Zwolle 26 July 1996, RV 1996, 17.

80 CRR 26 November 1993, case 229.619 DR 1994 supplement au no. 237.

81 CSRA 29 June 1995, JICRA 1995 no. 25.

82 ABRvS 6 November 1995, RV 1995, 4; ABRvS 19 March 1997, RV 1997, 2.

83 ABRvS 21 March 1997, NAV 1997, p. 405-409.

In sum, it turns out that an identical doctrinal position, combined with identical sources of information (see below under 2.3), which in the Netherlands was introduced by the Council of State with a view to harmonisation with Germany and France, leads to a contradictory picture and not to a harmonised one.

### **2.3 Sources for establishing the relevant facts**

All respondents from the relevant countries report that every kind of available information is used: UNHCR documents, Amnesty International reports, government documentation, and so on.

### **2.4 Civil war refugees**

One would expect that those jurisdictions where the existence of a governmental authority is required for persecution (Germany, France and Switzerland) one would find that claimants fleeing a civil war are excluded from refugee status. This is not the case, but to varying degrees.

German case law is closest to excluding civil war refugees from refugee status. The concept of persecution (both in the sense of Article 16a of the Constitution and in the sense of Paragraph 51 of the Aliens Act) presupposes the existence of governmental authority, which according to German case law is usually lacking in a civil war.<sup>84</sup> An exception is made for situations in which the State, although merely one of the belligerent parties, aims at physically annihilating an enemy in a way relevant for asylum, or in which the State conquers territories with the aim of persecuting vanquished parties.<sup>85</sup>

French case law to the contrary sees the Refugee Convention as in principle applicable to situations of civil war. However, it seems that the refugee definition is applied restrictively in such cases; for example, no Lebanese claimant was recognised as a refugee. In Switzerland as well the starting point is that the Refugee Convention is applicable, but many applications fail on account of a lack of targeting of the persecutory measures, as in the case of a Liberian claimant<sup>86</sup> and in the case of a Turkish claimant from the region where the emergency situation is in force (characterised as a civil war-like situation).<sup>87</sup> Under Swiss case law Bosnian Muslims could be recognised as refugees however, because the persecution from the Serbs was not undifferentiated but targeted at the religion of Bosnian Muslims; as it was systematic, organised and massive, this

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84 BVerwG 22 March 1994, 9 C 443.93.

85 BVerfG 10 July 1989, BVerfGE 80, 315.

86 CSRA 24 January 1994, case N 242106.

87 ARK 28 October 1993, EMARK 1993 no. 37.

persecution was collective in nature.<sup>88</sup> There is no conclusive case law of the Dutch Council of State on the issue after its change of position in the direction of the German/French/Swiss line, so this remains unclear.

Case law from the other jurisdictions finds the Refugee Convention applicable in principle to civil war situations. In all these countries, victims of undifferentiated violence – in other words: people fleeing general military activities – are not considered to be refugees. In the words of a Canadian decision: the fear the claimant has should not be that felt indiscriminately by all citizens as a consequence of a civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the enumerated persecution grounds.<sup>89</sup> In most jurisdictions the words ‘or even by all citizens’ are hard to imagine but no doubt even in the case of Canada they are of theoretical interest only. In Italy the Iraqi Kurds in the aftermath of the Gulf War were all recognised as refugees, be it formally on an individual basis. In Dutch practice, all Bosnian claimants arriving prior to the Dayton Agreement were recognised as refugees unless there were negative indicators (such as a criminal record or a country of first asylum).<sup>90</sup>

Canada is the only country covered in this research that does not have a significant practice of granting residence statuses other than the refugee status to claimants. All other countries have a bewildering and rather opaque practice on this point.

On paper, Germany has a clear statutory system of sub-statuses. In practice, this system has untidy effects, as there are no less than four sub-statuses and this system intermingles with a division of administrative competence between the Federal authority and the respective *Länder*. Sweden has two official sub-statuses: a B-status for, inter alia, claimants who cannot return to their country of origin because of armed conflict, and a temporary protection status. In the UK, exceptional leave to remain functions as a sub-status. In the Netherlands a conditional residence permit was introduced for situations of undifferentiated violence such as civil wars, but in practice the administration uses a variety of informal forms of non-deportation for specific groups as well. This ad hoc approach is the main instrument for regulating the presence of civil war refugees in Italy and France, where temporary protection is granted to various groups without any explicit legal basis.

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88 ARK 28 May 1997, EMARK 1997 no. 14.

89 *Salibian*, FCA 24 May 1990, FCJ 1990 no. 454; comp. the UK Court of Appeal decision of 13 February 1997, *The Times* 7 March 1997.

90 District Court The Hague (REK) 7 november 1996, RV 1996, 11, GV 18a-20.

The issue of non refugee statuses is so complex that in this context this is the most we can do. For more details, we refer to the respective country reports.

### **3. De facto authorities**

The question of persecution by de facto authorities in the absence of a functioning central government comes up only in jurisdictions where the existence of a government is a requirement for persecution. Therefore, in the following we address only the situation in Germany, France, Switzerland and the Netherlands (in the version of the Council of State). In these countries, it is deemed possible that, in the absence of a functioning central government there are de facto authorities that can be the source of persecution.

#### **3.1 Criteria for deeming de facto authorities present**

In German case law, it has been decided that in order to qualify as a de facto authority the group in question must be in effective control of the entire country or part of it; it must have established certain administrative and judicial structures; and its power must be of a certain stability and duration.<sup>91</sup> Such de facto authorities are to be distinguished from mere spheres of influence of rebel leaders, clan chiefs or comparable potentates.<sup>92</sup> In German case law it has been decided that there are no de facto authorities in Somalia and Afghanistan.

The Dutch Council of State finds decisive for the issue of considering an entity as a de facto authority whether in all or part of a country there has been established a government and a police force, as well as policy developing and executive apparatus, which together should be deemed able to exert essential administrative tasks such as the administration of justice, taxation, education or medical care – a formulation that seems to have been inspired by the criteria of the German Constitutional Court mentioned above. It decided however that such de facto authorities do exist since July 1993 in Somaliland (in the North West of Somalia) and, since a date not specified, in the province of Bari (in the North East of Somalia),<sup>93</sup> while they are lacking in Afghanistan.<sup>94</sup>

The Swiss criteria for deciding whether there are de facto authorities are virtually identical to those of the German Constitutional Court.<sup>95</sup> In Swiss case law, Bosnian Croats were considered to be de facto authorities,<sup>96</sup> as was the

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91 BVerfG 6 August 1996, 9 C 172.95.

92 BVerfG 15 April 1997, InfAuslR 1997, 397.

93 ABRvS 19 March 1997, RV 1997, 2.

94 ABRvS 21 March 1997, NAV 1997, p. 405-409.

95 EMARK 1993 no. 7 (see country report).

96 CSRA 10 January 1995, JICRA 1995 no. 2.

Taliban in Afghanistan.<sup>97</sup> The armed Islamist groups in Algeria are not seen as de facto authorities.<sup>98</sup>

In French case law, loose terminology is used for determining whether there is a de facto authority: such authority should exert a stable force over a given territory, with the ordinary attributes of power. The concept was developed in cases concerning former Yugoslavia; the self-proclaimed Serbian Republic of Bosnia was considered to be a de facto authority.<sup>99</sup> Until recently, de facto authorities were deemed absent in Somalia;<sup>100</sup> in a 1997 decision however Somaliland is seen as having de facto authorities capable of persecution.<sup>101</sup> De facto authorities have further been identified in Southern Lebanon,<sup>102</sup> Liberia<sup>103</sup> and Afghanistan.<sup>104</sup> In Algeria, and in Somalia with the exception of Somaliland, there are no de facto authorities.

### **3.2 Sources for establishing the relevant facts**

As in paragraph 2.3, respondents informed us that all types of information are used.

## **4. The role of the EU-Joint Position**

### **4.1 Not legally binding**

To reach a common European refugee standard the Council of the European Union adopted on 4 March 1996 on the basis of Article K.3 of the Treaty on the European Union a joint position on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees.<sup>105</sup> This joint position was the very first adopted in the framework of the Third Pillar of the Treaty on European Union.

As is clear from the different drafts the legal form of the harmonisation was the subject of lengthy debates. Some delegations wanted the document to take the form of a resolution only. Others wanted a more binding instrument. Therefore, several drafts were presented as joint actions. But finally in Novem-

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97 ARK 5 February 1997, EMARK 1997 no. 6

98 ARK 6 June 1995, EMARK 1996 no. 28.

99 CRR 12 February 1993, case 216.617; CRR 12 February 1993, case 230.571; CRR 7 April 1993, case 125.617; CRR 6 September 1993, case 247.455.

100 CRR 26 November 1993, case 229.619 DR 1994 supplément au no. 237; CRR 28 February 1995, case 270.619.

101 CRR 27 June 1997, in the case of *Jama Shide*, reported in OFRA, *Notion d'autorités de fait-guerre civile*, p.13.

102 CRR 5 July 1996, case 276.496.

103 CRR 4 September 1991, case DR, supplément au no. 181, p. 6.

104 CRR 26 October 1994, case 253.902.

105 OJ No. L063,13/03/96, p. 2 ff.

ber 1995 the choice was made to use the form of a joint position. The provisions concerning the Third Pillar of the Treaty on European Union are not clear as to the extent to which a joint position is binding. The Netherlands adopted the view that the wording used is the determining factor in this regard.<sup>106</sup> The use of the wording 'guidelines' in the preamble already indicates that the joint position on the harmonised application of the definition of the term 'refugee' is not legally binding. Furthermore, the joint position specifies in its preamble that these guidelines may inspire the administrative bodies responsible for recognition of refugee status 'without prejudice to the Member States' caselaw on asylum matters'. The joint position 'shall not bind the legal authorities or affect decisions of the judicial authorities of the Member States'. Without any doubt this joint position belongs to the 'soft law' domain only.

#### **4.2 Persecution by third parties**

Although UNHCR welcomed the EU harmonisation effort and supports many aspects of the joint position, it expressed an unprecedentedly sharp criticism on one of the core elements of the joint position: para. 5.2 concerning 'Persecution by third parties'. In principle, persecution by third parties is only accepted if 'it is encouraged or permitted by the authorities'. UNHCR's main concern is that this position 'will allow states to avoid recognising as refugees people persecuted by 'non state agents' such as rebel groups or extremist organisations'. According to UNHCR 'This interpretation creates an anomalous situation in which someone targeted by the government in a civil conflict could gain asylum abroad, but not an equally innocent civilian persecuted by the opposition, as has been the case with many Algerians'. And continues UNHCR 'if governmental authority collapses altogether – as has happened recently in Somalia or Liberia – no one might qualify for refugee status'. It believes that the joint position in this respect 'erodes refugee principles and could leave large numbers of refugees without adequate protection'.<sup>107</sup>

The wording of this paragraph changed considerably in the course of time. In a fall 1994 draft persecution by third parties was accepted if 'the government encourages, permits or deliberately tolerates such persecution', but also – in line with the UNHCR-Handbook<sup>108</sup> – if 'the public authorities are unable to provide adequate protection'.<sup>109</sup> Gradually, the liberal wording changed dramatically. In a February 1995 draft persecution by third par-

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<sup>106</sup> Second Chamber of Parliament, 1993-1994, 23 490, No. 8.

<sup>107</sup> Press Release 'UNHCR expresses reservation over E.U. Asylum Policy', 24 November 1995.

<sup>108</sup> UNHCR-Handbook, par. 65.

<sup>109</sup> 6675/94, ASIM 90.



ties is deemed to stem from the State itself 'where it is encouraged or permitted by the authorities. In other cases, persecution is the act of persons or groups acting autonomously. As a general rule, such action does not in itself warrant the grant of refugee status. However, the State may be held responsible where the authorities tolerate such persecution knowingly or fail to act upon it although they are able to provide protection. Refugee status may be recognised under such conditions'.<sup>110</sup> A September 1995 draft is even more restrictive.<sup>111</sup> In this draft persecution by third parties is in addition to 'encouraged or tolerated' ('fördern oder billigen') only accepted 'wenn der Urheber der Verfolgung sich in einer Position befindet, aufgrund deren eine Unterbindung oder schwere Störung der normaler Tätigkeit der öffentlichen Stellen die für de Schutz der Bürger zuständig sind, gegeben ist'.<sup>112</sup>

It is clear from the footnotes and reservations to the text that persecution by third parties was one of the main stumbling blocks. To avoid a complete failure of the negotiations on the harmonisation of the refugee definition France presented a compromise during an informal JHA- Council at La Gomera on 14 and 15 October 1995. The final wording of para. 5.2 is based on this compromise:

*'Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.'*

Its long and turbulent history requires a careful consideration of the text of para. 5.2. To the position that persecution by third parties is only accepted if 'it is encouraged or permitted by the authorities' three reservations are made.

First, a State's failure to act should give rise to 'individual examination of each application (...) in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate'. In other words,

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<sup>110</sup> 4245/1/95, ASIM 8.

<sup>111</sup> We only have a German version, which may be rather indicative for the origin of the restrictive attitude.

<sup>112</sup> 8628/2/95, ASIM 209, which means that the persecution by a third party is accepted as persecution in the meaning of the refugee definition in a situation in which the normal activities of the public authorities responsible for the protection of citizens are disintegrated or heavily disturbed.



in accordance with the principle of respect of national jurisprudence as mentioned above, Member States are free to follow their own national judicial practice in this respect.

Secondly, persons who are the victim of third party persecution 'may be eligible in any event for appropriate forms of protection under national law'. Also in other paragraphs of the joint position reference is made to 'other forms' of protection under national legislation. But the stronger wording 'in any event' and 'adequate protection' in par. 5.2 may indicate that nothing inhibits the Member States from offering in the context of persecution by third parties protection as indicated by the Geneva Convention.<sup>113</sup>

Thirdly, the Swedish delegations made in an annex an express statement for the Council minutes, considering that persecution by third parties 'may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection'.

These explicit reservations to the position that persecution by third parties is only accepted if it is 'encouraged or permitted by the authorities' indicates that the issue whether or not the inability to offer protection also constitutes persecution is deliberately left outside the harmonisation process. Member States who considered in the past persecution by third parties as persecution if the authorities proved to be unable to offer effective protection are expressis verbis are permitted to continue this practice.

#### **4.3 Civil war**

The provision of para. 6 on 'Civil war and other internal or generalised armed conflicts' should be read in connection with para. 5.2. The wording did not change since February 1995. In a civil war:

*'persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from de facto authorities in control of part of the territory within which the State cannot afford its national protection'.*

In our opinion, consistent interpretation requires that the reservations of para. 5.2 are also applicable to persecution by third parties in the context of a civil war or other internal armed conflicts.

Interesting as well is the fact that persecution by de facto authorities is considered as persecution within the meaning of the Geneva Convention if they are 'in control of part of the territory within which the State cannot afford its national

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<sup>113</sup> See Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano (Eds.), *Who is a refugee?*, Appendix, o.c., p. 721.

protection'. Nevertheless this reference to de facto authorities still leaves many questions open. What will be the joint position in a situation in which there is no government anymore? The use of the word 'State' in this context instead of 'legal authorities' as in the first part of the sentence may be deliberate. State is a rather formal expression, legal authorities a more factual one. One could argue that in a situation in which no government, no legal authority, anymore exists, there is still a State but this State cannot afford its protection. In such a situation the de facto authorities may be held responsible directly. Such an interpretation would be in line with the idea of protection as the central theme of the Refugee Convention, irrespective of the 'de facto' or 'legal' origin of the persecution.

#### **4.4 Reference to the Joint Position in the case law**

As we have seen, the Dutch Council of State invokes the Joint Position to justify its position on persecution in the absence of a functioning government. Likewise, the German Federal Administrative Court has referred to it in this respect.<sup>114</sup> The UK Court of Appeal has also referred to it in this context.<sup>115</sup> In other EU countries, the Joint Position has not been referred to in case law.

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<sup>114</sup> BVerwG 15 April 1997, *InfAuslR* 1997, 397.

<sup>115</sup> CA 13-02-1997, *Hassan Adan case*, *ImmAR* 1997, 251.

## CHAPTER IV. COMPARATIVE CONCLUSIONS AND TABLES

### **Which interpretation is given to the term 'persecution' in case a central government no exists in the country of origin of the asylum seeker?**

At first sight it seems that on the question whether persecution is possible in situations where an effective central government is absent two answers are possible. The first one would be that this is possible, as government complicity in persecution is inessential, and that the usual doctrinal instruments for assessing persecution by third parties apply. The second answer would be that, as some form of government complicity is central to the concept of persecution, in the absence of governmental authorities no persecution is possible.

### **Which countries do accept the possibility of persecution in such circumstances (liberal interpretation) and which do not (restrictive interpretation)?**

If we would limit our investigations to the two approaches mentioned above, we would get an orderly picture. Of the eight countries covered in this research, four (Germany, Switzerland, France, the Netherlands/Council of State) fall into the second, restrictive category and five (Canada, the UK, Sweden, Italy, Netherlands/District Court) into the first, liberal one (we have counted the Netherlands as two jurisdictions; for our purposes it has fallen into two divergent views, being the Council of State and the District Court).

*Is persecution in the sense of the Geneva Convention possible without a government?*

Canada	France	Italy	Germany	Netherlands	Sweden	Switzerland	United Kingdom
+	-	+	-	+/- (1)	+	-	+

(1) The view that there could be no persecution if there was no effective government was held by the Council of State.

### **Which countries do apply on the one hand a restrictive interpretation as mentioned above and on the other hand do accept persecution by third parties?**

*Can there be persecution by third parties (+)?*

country of origin )	Lebanon	Liberia	Afghanistan	Somalia	Algeria	Colombia
acc. to:						
France	+	+	+	-	+	+
Germany	+	+	-	-	+	?
Switzerland	+	+	+	-	+	+
Netherlands	+	+	+	+	+	+

**Under which conditions is persecution by third parties in these countries accepted as persecution within the meaning of the Refugee Convention?**

The question of persecution in the absence of a government is closely related to the issue of third parties as agents of persecution and the issue of civil war refugees. If we look at the issue of third parties as agents of persecution, the restrictive group falls apart. French and Swiss case law consistently finds some form of State complicity essential for accepting persecution by third parties as persecution in the meaning of the Refugee Convention. German doctrine is close to this but makes an exception for a State's durable inability to grant protection against persecution by third parties. The Dutch Council of State since 1995 follows the inconsistent line that State complicity in persecution is not required, but the existence of a government is.

**Is state accountability required in the case of persecution by third parties ?**

Canada	France	Germany	Netherlands	Sweden	Switzerland	United Kingdom
-	+	+(1)	-	-	+	-

(1) There is a case where the need for state accountability is unclear (BVerwGE 95, 42)

**Which countries offer temporary protection to asylum seekers fleeing civil-war situations? Which criteria are used to establish the fact that there is a civil war? Is a civil war considered as equivalent to a situation in which a central governmental authority no longer exists?**

The coherence of the restrictive group is further undermined once we include the position on civil war refugees. One would expect that those jurisdictions where the existence of a governmental authority is required for persecution (Germany, France and Switzerland) would find that claimants fleeing a civil war are excluded from refugee status. On this issue, German case law seems closest to being consistent in excluding those claimants from refugee status,

but French and Swiss case law seem more in conformity with the liberal jurisdictions here.

The respondents are silent on the issue of the criteria establishing the fact that there is a civil war. But in all the jurisdictions in which the Refugee Convention is considered as in principle applicable to civil war situations, victims of undifferentiated violence – in other words: people fleeing general military activities – are not recognised as refugees.

Canada is the only country covered in this research that does not have a significant practice of granting residence statuses other than the refugee status to claimants. All other countries have a bewildering and rather opaque practice on this point.

### **Which role plays the existence of an internal flight alternative in the country of origin in this regard?**

The consistency of the liberal group of jurisdictions also falls apart once we look at the concept of the internal flight alternative in this regard. Although all these jurisdictions apply the principle in ways that seem to be similar, there are notable differences as to the question in which situations the concept may be applied. Canada is most restrictive on this point, applying it irrespective of the identity of the persecutor; in the United Kingdom, the concept is only applied when the persecutor is a third party, while the Netherlands applies it when the persecutor is not the central authority.

*The use of the Internal Flight Alternative is related to the nature of the agents of persecution*

Canada	France	Germany	Nether- Lands	Switzer- land	United Kingdom
-	+ (1)	-	+ (1)	+ (1)	+ (2)

(1) If the persecutor is the central government, there cannot be an internal flight alternative.

(2) There can only be an internal flight alternative if the persecutor is a third party, unless it can be shown that the State's mandate does not run to the whole of the territory.

### **In a situation in which central governmental authority no longer exists which of the countries which apply a restrictive interpretation nevertheless do accept the possibility of persecution in the meaning of the Refugee Convention of local and/or de facto authorities?**

When we analyse the practical effects of the restrictive approach on countries of origin of asylum applicants, the lack of governmental authorities is deemed relevant for four countries of origin, but with different results, as the following table shows.

*Is there considered to be an effective authority (local/de facto) present?*

country of origin › acc. to:	Lebanon	Liberia	Afghani- stan	Somalia	Algeria	Colombia
France	+	+(1)	+	-(6)	+	+
Germany	+	+(2)	-(3)	-(7)	+	?
Switzer- land	+	+	+(4)	-	+	+
Nether- lands	+	+	+(5)	+(8)	+	+

(1) From 1991 until now there is considered to be a de facto authority in Liberia. Attention should be had to the fact that there has been no jurisprudence in 1997.

(2) From December 1989 until December 1997 there was not considered to be an effective authority. Since December 1997 there is considered to be a de facto authority present.  
(3) Since 16 august 1992.

(4) Since 5 February there is considered to be a de facto authority in Taliban controlled area's.

(5) From 1992 until March 1998 there was not considered to be an effective authority. Since April 1998 there is considered to be a de facto authority.

(6) Except for Somaliland. There is considered to be a de facto authority since 27 june 1997. (7) Since January 1991.

(8) In the period between 1991 and May 1995 there was not considered to be an effective authority present, after this date there is considered to be de-facto authority present except for the Mogadishu area. For Somaliland there is considered to be a de facto authority since July 1993.

### **What criteria and what kind of information are used to establish the fact that there is an entity qualifying as a de facto authority?**

In German case law, it has been decided by the German Constitutional Court that in order to qualify as a de facto authority the group in question must be in effective control of the entire country or part of it; it must have established certain administrative and judicial structures; and its power must be of a certain stability and duration. The Dutch Council of State uses a formulation that seems to have been inspired by the criteria of the German Constitutional Court. But contrary to German case law it decided however that with regard to Somalia such de facto authorities do exist in Somaliland (in the North West of Somalia) and in the province of Bari (in the North East of Somalia).

Also the Swiss criteria for deciding whether there are de facto authorities are virtually identical to those of the German Constitutional Court.

In French case law, loose terminology is used for determining whether there is a de facto authority: such authority should exert a stable power over a given territory, with the ordinary attributes of power.

The respondents did not provide specific information on the kind of sources used for establishing de facto authority.

### **The role of the EU-Joint Position**

The Dutch Council of State invokes the Joint Position to justify its position on persecution in the absence of a functioning government. Likewise, the German Federal Administrative Court has referred to it in this respect. The UK Court of Appeal has also referred to it in this context. In other EU countries, the Joint Position has not been referred to in case law.

### **Conclusions**

This summary of both the doctrinal positions and of the practical effects of the restrictive approach lead us to the following conclusions.

First, from an empirical point of view it seems almost impossible to say that the refugee definition itself compels any clear position on the issues of agents of persecution and persecution in the absence of governmental authorities. Apparently, many different positions are seen as consistent with, or as embodying the true meaning of, the refugee definition.

Second, it turns out that the interpretation of the refugee definition is not dominated by a search for internal consistency of legal doctrine. The internal inconsistency of case law in most jurisdictions covered in this research – if we look at the three interrelated issues of agents of persecution, civil war refugees and persecution in the absence of governmental authorities – is striking.

Third, it seems that the introduction of the requirement that there be a functioning government in the country of origin complicates a harmonised application of the refugee definition. Of the four jurisdiction in which this requirement is applied, not even two agree on what it means practically.

## ANNEX 1

24 November 1997

Dear madam/sir,

### Origins of persecution

At the request of the Dutch Ministry of Justice we are carrying out a short research on the current legal situation in refugee law as regards origins of persecution.

Our results will be presented to the Ministry (but will also be published) and publicly available. We would like to ask your assistance, regarding your national law, in answering the following questions. We would be most grateful for all relevant literature, for copies of any relevant Court decisions, policy documents and other material on this issue.

In your national law:

1. (a) Can persecution by third parties be considered persecution within the meaning of the Geneva Convention? If so, under what circumstances?
1. (b) Can the existence of an internal flight alternative in the country of origin preclude an applicant from refugee status?
1. (c) If so, is it considered relevant who is the persecutor (central/local authorities, third parties etc.)?
2. (a) Can someone from a country without a government be persecuted in the sense of the Geneva Convention or not?
2. (b) If not, for which countries of origin and for which periods of time is persecution excluded?
2. (c) What kind of information is used to establish this and from what sources?
2. (d) How does your country deal with asylum-seekers fleeing civil-war situations? (keywords: temporary protection, criteria to establish the fact that there is a civil war, status determination)



3. (a) If there is no central government and this is a requirement for the applicability of the Geneva Convention, does your country accept the possibility that there is persecution by local/de facto authorities?

3. (b) If so, what criteria are used to establish the fact that there is an entity qualifying as a local/de facto authority?

3. (c) If so, what kind of information is used to establish this and from what sources?

4. Is the Joint Position of 4 March 1996 adopted by the Council on the basis of Article K3 of the Treaty on the European Union on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention (Official Journal 1996 L 63/5; see attachment) taken into account in current policy and/or jurisprudence? If so, could you provide any information/documentation about this?

We would like to thank you in advance for your co-operation. We are fully aware that not all of these questions may be answered easily. As there is a time constraint, we would be most obliged if it would be possible to receive your answers as soon as possible. We will try to contact you within a week for further details.

We will, of course, be happy to reimburse any costs you incur in copying, postage etc. May I add that we will take care of any necessary translations ourselves. We are sorry that it is not possible to provide an honorarium or other payment for your assistance.

Yours faithfully,

prof. mr. Roel Fernhout  
mr. Thomas Spijkerboer  
prof. mr. drs. Ben Vermeulen  
mr. Karin Zwaan

Please send your answers, copies etc. to the following address: Karin Zwaan  
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## **ANNEX 2 COUNTRY REPORTS**

### **Country Report Canada**

#### **Respondents:**

P. Duschinsky (Citizenship and Immigration Canada) reader  
L. Haberl (Immigration and Refugee Board) A. Macklin (Dalhousie University)  
S. Smith (UNHCR)

#### **Abbreviations**

FCA	Federal Court of Appeal
FCJ	Federal Court Judgements IAB Immigration Appeal Board
Imm.L.R.	Immigration Law Reports
IRB	Immigration and Refugee Board
SCC	Supreme Court of Canada
SCJ	Supreme Court Judgements

#### **1. (a)**

The agents of persecution – that is, the immediate perpetrators of the persecution – may be either persons attached to the government, or non-governmental actors. State involvement is not a prerequisite to persecution under the Convention refugee definition. When the agents are non-governmental, the state need not be complicit in their actions in order for persecution to exist. Persecution by third parties can be considered to be the basis for well-founded fear of persecution. Persecution by non-state agents was addressed in the leading case on this issue, the Ward decision (Ward SCC 30-06-1993, SCJ 1993 no. 74, 20 Imm.L.R. (2d) 130). The Court held that there was no need for the state to be complicit in the persecution alleged in order for there to be persecution within the meaning of the definition.

State complicity in the persecution feared is not required where the claimant can show that the state is unable to protect her or him from the actions of third persons. Persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens. There are two distinct fact situations which must be considered – in some cases the state's inability to provide protection will arise because of the nature of the persecuting group. In others it will result from the disintegration of state authority as a result of civil war or other civil strife (under 2. (d)).

It matters not who the source of persecution is. The issue is whether or not they can obtain protection from the state. There is generally a presumption that

protection will be forthcoming and the onus is on the claimants to show that the state cannot provide protection. As nations should be presumed capable of protecting their citizens, so unless there is an admission by the state that it cannot afford protection, clear and convincing confirmation of a state's inability to protect must be provided.

A claim involving a non-state agent of persecution will be founded if the state turns a blind eye to the actions of the persecutor or the state is unable to protect the claimant. Since no government that makes any claim to democratic values or protection of human rights can guarantee the protection of all its citizens at all times, the Court of Appeal in *Villafranca* held that it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in this particular situation (*Villafranca*, FCA 18-12-1992 FCJ 1992 no. 1189, 18 *Imm.L.R.* (2d) 130). When describing the protection, the Court of Appeal has suggested adequate though not necessarily perfect (*Zalzali*, FCA 30-04-1991, FCJ 1991 no, 341). No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. Where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection (*Villafranca*, FCA 18-12-1992 FCJ 1992 no. 1189, 18 *Imm.L.R.* (2d) 130).

Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by clear and convincing evidence of the state's inability to protect.

### 1. (b)

The first reference in jurisprudence to the concept of internal flight alternative was in the *Zalzali* case (*Zalzali*, FCA 30-04-1991, FCJ 1991 no, 341). The following comment was made: 'I know that in principle persecution in a given region will not be persecution within the meaning of the Convention if the governments of the country is capable of providing the necessary protection elsewhere in its territory, and if it may be reasonably expected that, taking onto account all the circumstances, victims will move to that part of the territory where they will be protected.' The key concepts concerning internal flight alternative come from two cases: *Rasaratnam* (FCA 05-12-1991, FCJ 1991 no. 1256) and *Thirunavukkarasu* (FCA 10-11-1993, FCJ 1993 no. 1172). From these cases it is

clear that the test to be applied in determining whether there is an internal flight alternative is two-pronged.

- (1) The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an internal flight alternative exists.
- (2) Moreover, conditions in the part of the country considered to be an internal flight alternative must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.

The test is an objective one: is it objectively reasonable to expect the claimant to seek safety in a different part of the country? Another way of stating the question is: would it be unduly harsh to expect the claimant to move to another, less hostile part of the country before seeking refugee status abroad?

An internal flight alternative cannot be speculative or theoretical only; it must be a realistic, attainable option. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or staying there. However, it is not enough for the claimant to say that he or she does not like the weather there, or that he or she has no friends or relatives there, or that he or she may not be able to find suitable work there.

In determining whether there is an objective basis for fearing persecution in the internal flight alternative, the Refugee Division must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there.

Factors such as the claimant's age, appearance (including gender), religion, political profile, as well as the presence or absence of relatives in the internal flight alternative area, the employment situation, the type of residence available, the ability to speak the language, the ability to raise a family, the crime rate, the physical and financial barriers, the composition of the 'family' unit (it appears this may also go to fear of persecution), previous residence in the internal flight area, familiarity with the internal flight area, the capacity of the claimant to re-establish him or herself, whether there is a similar group located in the internal flight area, race or ethnicity of the claimant (this may also go to fear of persecution), having a registration card, being registered with the police, ability to move from one residence to another (e.g. legal restrictions), and the health and financial situation of the claimant are factors which have to be taken into consideration.

All these factors have to be weighed to see whether it would be 'unduly harsh' to expect a claimant to move to a potential area of internal flight.

**1. (c)**

The identity of the persecutor is not a factor, i.e.. the persecutor may be the state or a non-state agent. The nature and the agents of the persecution feared ought to suggest that the persecution would be confined to particular areas of the country. The fact, however, that the agents of persecution are the central authority in the country does not prevent a finding that there is an internal flight alternative.

In the *Saini* case the FCA rejected the argument that it was not possible to apply the internal flight concept in a federal state under the control of one central authority in situations where the claimant was persecuted by agents of the central government. The claimant was not in danger of persecution at the hands of the same central government in the rest of the country. The internal flight alternative should only be applied where there is clear evidence that the particular claimant would be safe from persecution in some other part of the country (*Saini*, FCA 22-03-1993 A-750-91).

**2. (a)**

A claim may succeed where the state is unable to provide protection because state authority has collapsed entirely (e.g. Lebanon, Somalia) (*Salibian*, FCA 24-05-1990, FCJ no. 454, *Zalzali*, FCA 30-04-1991, FCJ 1991 no. 341).

There may arise situations of partial collapse of the social order which are short of outright civil war, but where the state is unable to provide adequate protection to some of its citizens against actions by private agents who are acting without the consent or authority of the state. One must determine whether or not there is convincing proof that the state would be unable to provide protection. There may be several established authorities in a country which are each able to provide protection in the part of the country controlled by them. The 'country', the 'national government', the 'legitimate government', the 'nominal government' will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition.

The possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them is not ruled out, protection which may be adequate though not necessarily perfect. In some cases it is found that there can be found protection in Somalia. For instance the FCA has decided that the Somali National Movement could be seen as the government controlling the north of the country (Somaliland), and although not an internationally recognized government would be able to provide the applicant with protection in the north (*Sami*, FCA 01-06-1994, FCJ 1994 no. 825).

Interesting is also the case of *Chebli-Haj Hassam*, where the FCA held that in the circumstances where there is a legitimate government supported by the

forces of another government and there is no difference in interest between the two governments in relation to a refugee claimant, the protection given to the claimant is adequate to establish an internal refuge (*Chebli-Haj Hassam*, FCA 28-05-1996, FCJ 1996 no. 753: 'The important thing in our view, is that there is a legitimate government in most of Lebanon that is in a position to guarantee the needed protection. From the record, it is clear that the Lebanese government needs, for its continued existence, the support of the government and armed forces of Syria. But it is nonetheless a legitimate government that could, in this instance, with the help of the Syrians if needed, protect the person of the claimant. The situation would be entirely different if protecting the appellant meant contradicting the interest of the Syrians. But this is not the case.')

**2. (b) and 2. (c)**

Not applicable, in light of the answer to 2. (a)

**2. (d)**

A state of civil war is not an obstacle (in and of itself) to an application for refugee status. In the case of *Salibian* (*Salibian*, FCA 24-05-1990, FCJ 1990 no. 454) four general principles are set out:

- (1) the applicant does not have to show that he had himself been persecuted or would himself be persecuted in the future;
- (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
- (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; and
- (4) the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin.

In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.

For instance Christians in a Lebanese village were collectively targeted. It was not established that their position was in some way different from the general victims of the tragic and many-sided civil war (*Rizkallah*, FCA 06-05-1992, FCJ 1992 no. 412).

In the case of *Zalzali* (*Zalzali*, FCA 30-04-1991, FCJ 1991 no, 341) the FCA dealt with the question of whether or not a claim could be grounded in a state's inability to provide protection due to a collapse of state authority during a civil war situation. The court noted: 'The essence of the question that arises in the case at bar, when it is reduced to its simplest and most practical form, is as follows: can there be persecution within the meaning of the Convention and the Immigration Act when there is no form of guilt, complicity, or participation by the state? I consider that in the light of the wording of the definition of a refugee, the judgements of this court and scholarly analysis both in Canada and abroad, this question must be answered affirmative. The definition of a 'refugee' refers to the fear 'of persecution' without saying that this persecution must be 'by the government'. This omission seems to me to be extremely significant. I do not see by what rule of interpretation the meaning of the word 'persecution' should be limited, especially as the very objectives of the Immigration Act which incorporate the definition into Canadian law, encourage the taking of a liberal and generous approach. That is not all. As my brother Judges pointed out in *Ward*, the natural meaning of the words 'is unable' assumes an objective inability on the part of the claimant, and the fact that 'is unable' is, in contrast to 'is unwilling' not qualified by 'by reason of that fear', seems to me to confirm that the inability in question is governed by objective criteria which can be verified independently of the fear experienced, and so independently of the acts which prompted that fear and their perpetrators. Seeing a connection of any kind between 'is unable' and complicity by the government, would be to misread the provision.'

When assessing claims that arise out of a civil war situation, one must look at the evidence concerning country conditions in order to ascertain whether or not the state is able to provide protection. If the evidence established that there is a serious possibility that the state cannot protect an individual from persecution arising from the civil war situation and if the persecution is grounded in a Convention ground, then the claim should be accepted.

### **3. (a) (b) (c)**

Not applicable in the light of the answers given above.

### **4.**

Not applicable in Canada.

### **Literature**

Donald, J., and Dirk Vanheule, Canada, in: J.Y. Carlier, D. Vanheule, K. Hullmann en C.P. Galiano (Eds.), *Who is a refugee? A comparative Case Law Study*, Den Haag/London/Boston 1997.

Immigration and Refugee Board, *Interpretation of the Convention Refugee Definition in the Case Law*, Ottawa 1996, updated version available on the Internet <http://www.cisr.gc.ca>.

Immigration and Refugee Board, Guidelines issued by the Chairperson pursuant to section 65 (3) of the Immigration Act, Civilian Non-Combattants Fearing Persecutions in Civil War Situations, Ottawa 1996, also available on the Internet <http://www.cisr.gc.ca>.

Waldman, L., *Immigration Law and Practice*, Toronto 1992.



## Country Report France

### Respondents

- A. Angoustures (Commission des Recours des Refugies)
- B. Horbette (Office français de protection des réfugiés et apatrides) reader
- J. van der Klaauw (UNHCR Brussel)
- I. Totikaev (Amnesty International)
- F. Tiberghien

### Abbreviations

AJDA	Actualité juridique Droit Administratif
CE	Conseil d'Etat/Council of State
Concl.	Conclusions
CRR	Commission des recours des réfugiés/Appeals Board
DR	Documentation Réfugiés
HCR	Haut Commissaire des Réfugiés/UNHCR
IJRL	International Journal of Refugee Law
OFPRA	Office français de protection des réfugiés et apatrides/ French Office for the Protection of Refugees and Stateless Persons

### 1. (a)

Normally persecution is an act of the authorities. For quite a long time requests based on persecution emanating from private groups, whether or not organized, were rejected. Persecution not directly emanating from the State or its organs could not lead to refugee-status.

The first step forward was the *Duman* case. An asylum seeker was recognized as a refugee who reported repeated and systematic ill treatment organised by the population against inhabitants of Christian denomination, and this ill-treatment was tolerated by the government. (CRR 03-04-1979 '... des mauvais traitements répétés ou organisés par la population contre une minorité en raison de la passivité complaisante et de l'inaction volontaire des autorités du pays', Amnesty International Section Française et France Terre d'Asile, Droit d'Asile en France, état des lieux. Paris 1997, p. 44).

In the *Dankha* case this line of reasoning has been confirmed. This decision recalls that persecution does not automatically imply a public authority. Persecution that does not emanate from the public authorities can lead to recognition where the facts are in fact tolerated or encouraged by the public authorities, effectively making it impossible for the interested party to claim the protection of these authorities. (CE 27-05-1983 AJDA 1983, p. 481 'Considérant qu'il ne résulte pas de ce texte (i.e. Art. 1 A of the Convention) que les persécutions subies doivent émaner des autorités publiques; que des persécutions exercées

par des particuliers, organisés ou non, peuvent être retenues, dès lors qu'elles sont en fait encouragées ou tolérées par l'autorité publique, de sorte que l'intéressé n'est pas effectivement en mesure de se réclamer de la protection de celle-ci...'). Persecution emanating from a rival separatist group (CRR 11-02-1991 case 155.818) or an opposing political party (CRR 03-07-1992 case 225.170) that had been encouraged or tolerated by the public authorities can lead to refugee-status. Persecution exerted by a para-governmental militia in Colombia (CRR 10-02-1995 case 264.759), a political organisation (CRR 10-11-1993 case 240.429) and even by an influential Moorish family (CRR 30-06-1995 case 281.347) can lead to refugee status.

Not seen as persecution are maltreatments by a militia, without being encouraged by the authorities (CRR 07-01-1991 case 58.484), harassment against transsexuals by non-organized groups in Argentina (CRR 24-07-1990 case 93.031 DR no. 145 p. 3)

The general context in which the persecution takes place can also lead to the conclusion that acts by private individuals are if not encouraged, at least tolerated by the government in power. (CRR 15-01-1991 case 148.627 Algerians who have been the victim of persecution by Islamic fundamentalists.) Groups which are fought against by the authorities cannot be regarded as encouraged by them and as inflicting persecution. This goes for example for the Shining Path in Peru, members of the F.I.S. in Algeria, the mafia in Colombia and separatists like the Tamil Tigers in Sri Lanka. If the authorities are willing, but unable to give protection, measures of third parties are not relevant.

Persecution by third parties can be considered as persecution in the sense of the Geneva Convention, but only if the authorities voluntarily encourage or tolerate their activities. In order to know if the authorities voluntarily tolerate the persecution by individuals, organized or not, it is examined if the claimant has applied to the authorities for help and protection.

If the authorities are willing, but unable to give protection, measures of third parties are not relevant. Even if the protection given by the authorities is insufficient or ineffective, authorities are regarded as giving protection. According to jurisprudence the impossibility, for the authorities, to protect personally and efficiently the claimant cannot be regarded, in the absence of a systematic refusal of protection, as voluntary tolerance by these authorities of the acts the claimant suffered. (CE 22-11-1996 case 167.195 'Considérant que M.M. soutient, qu'il est vrai, que le gouvernement algérien 'tolérait implicitement' les agissements de groupes terroristes et que, en tout cas, son incapacité à les prévenir ne mettrait pas les victimes de persécutions effectivement en mesure de se réclamer de la protection de l'Algérie, au sens des stipulations mentionnées de la Convention de Genève; mais que, à défaut de tout encouragement aux persécutions allégués ou de toute tolérance volontaire de celles-ci par

l'autorité publique, M.M. n'est pas fondé à soutenir que la Commission (CRR) aurait fait une fausse application de l'article 1er, alinéa 2. de la Convention de Genève en estimant que les circonstances alléguées n'entraient pas dans le champ de cet article' also CRR 11-04-1995 case 271.021, CRR 12-09-1995 case 272.728 CRR 27-02-1996 case 285.035.) From all this follows that indirect participation of the authorities through its tolerance or encouragement is a requirement for the possibility to apply the Geneva Convention. One has to conclude from all of this that once there has been decided there is no effective government at all (central/local/de-facto) there cannot be persecution in the sense of the Geneva Convention. Also not by third parties. For France this is only the case for Somalia.

**1. (b)**

The notion of an internal flight alternative is not applied in France explicitly. It can be applied implicitly along with other factors like persecution grounds.

The possibility of an internal flight alternative is not seen as a factor in the cases of persecution by the central authorities; it can be applied (along with other issues) however in the case of persecution by local authorities and third parties.

**1. (c)**

No. But the implicit consideration of the possibility of an internal flight alternative only seems to occur in jurisprudence concerning de facto authorities.

**2. (a)**

If one looks at the line of reasoning in the *Dankha*-case, it must be concluded that there can be no persecution if there is no government.

For Somalis the OFPRA decided that the Geneva Convention was not applicable because there was no organized power in the particular countries. The CRR for example refused to recognize Somalis as refugees on the grounds that without de facto authorities or a government in place, the nationals of this country are not entitled to refugee status according to the terms of the Geneva Convention. (CRR 28-02-1995 case 270.619 : 'Considérant que, dans la situation qui règne actuellement en Somalie, les craintes exprimées par ses ressortissants sont liées au climat généralisé d'anarchie qui prévaut dans ce pays où, en dépit des efforts entrepris par l'Organisation des Nations Unies pour restaurer l'existence d'un pouvoir légal, des clans, sous clans et factions d'une même ethnie luttent pour créer ou étendre des zones d'influence à l'intérieur du territoire national sans être toutefois en mesure d'exercer dans ces zones un pouvoir organisé qui permettrait, le cas échéant, de les regarder comme des autorités de fait (see 3. (a); que ces craintes peuvent, en conséquence, être assimilées à des

craintes de persécutions au sens des stipulations précitées de la Convention de Genève, lesquelles subordonnent la reconnaissance de la qualité de réfugié à l'existence de craintes personnelles de persécutions émanant des autorités du pays dont le demandeur a la nationalité ou encouragées ou volontairement tolérées par ces autorités', see also IJRL 1994, p. 120.)

It seems that in a situation of anarchy, lack of any organized power or authority, there is no room for persecution. Persecution has to emanate directly or indirectly from public authority (also 1. (a) If there is no authority (central/de facto/local) there can be no persecution in the sense of the Geneva Convention.

## **2. (b)**

*Somalia*. In a decision of 26-11-1993 the CRR decided that there is a situation of anarchy in Somalia (CRR 26-11-1993 case 229.619 DR 1994 supplement au no. 237). Only Somaliland is seen as having some kind of authority in power.(CRR 27-06-1997 in the case *Jama Shide* reported in OFPRA, *Notion d'autorités de fait-guerre civile*, p. 13) About the periods of time persecution is excluded nothing has been officially stated, but Somali nationals claims have kept on being dismissed until now.

## **2. (c)**

All available information about the country of origin is used. For instance press releases, UNHCR information, information by researchers, information gathered by the Ministry of Foreign Affairs etc.

## **2. (d)**

The Geneva Convention is seen as applicable in situations of civil war. But the only existence of a civil war is not sufficient for refugee status.

A number of questions have to be answered. Is there still an authority? Is the persecution inflicted by the public authority or by groups supported voluntarily or not by the public authorities? Refugees from civil war areas usually receive temporary protection. This kind of protection is fully discretionary and has no basis in internal law.

For example, only very few Lebanese asylum seekers have been recognized as refugees, which suggests that the relation between civil war and refugee law was seen as problematic. Also an asylum seeker who came from a country in the throes of civil war was not considered to be persecuted since he was still able to benefit from the protection of the authorities in his country of origin. (CRR 07-09-1990 case 105.028.)

### 3. (a)

The notion of de facto authorities ('autorité de fait') has been developed in French case-law in the context of the conflicts in Ex-Yugoslavia. Until 1993 it was generally accepted that militias, terrorist groups or guerrillas were not among the authorities that could inflict persecution. After the breaking up of Yugoslavia a set of decisions were taken that granted refugee status to claimants who invoked fear of persecution by de facto/local authorities. For example refugee status was granted in cases of persecution in Bosnia by militia of de facto authorities of the so called 'Self proclaimed Serbian Republic of Bosnia'. There was no possibility for the claimants to avail themselves the protection of the Bosnian authorities, because the region was controlled by that de facto authority. (CRR 12-02-1993 case 216.617 CRR 12-02-1993 case 230.571 CRR 07-04-1993 case 125.617 CRR 06-09-1993 case 247.455.)

Judging the situation in Somalia, the CRR concluded that after the demise of any legal authority, clans, sub-clans and factions of a single ethnic group are fighting to create or to extend zones of influence within the national territory without, however, being in a position to exercise organized authority in these zones that would enable them to be regarded, if need be, as de facto authorities. (CRR 26-11-1993 case 229.619: 'l'existence d'un pouvoir légal, des clans, sous clans et factions d'une même ethnie luttent pour créer ou étendre des zones d'influence à l'intérieur du territoire national sans être toutefois en mesure d'exercer dans ces zones un pouvoir organisé qui permettrait, le cas échéant, de les regarder comme des autorités de fait' also CRR 28-02-19 case 270.619.)

De facto authorities have been identified in Lebanon (CRR 01-03-1984 case 23.030 CRR 05-10-1987 case 61.534 CRR 05-07-1996 case 276.496 'La milice de l'autorité de fait qui occupe actuellement la région de Sud-Liban'), Liberia (CRR 04-09-1991 DR Supplément au no. 181 p. 6 '...où, des factions rebelles se partageant le pouvoir de fait') and Afghanistan (CRR 26-10-1994 case 253.902 'Elle peut craindre avec raison d'être persécutée, à la fois par les forces de l'ex- président Rabbani, par celles de l'ex-premier ministre Hekmatyar et par les autres autorités qui exercent actuellement un pouvoir de fait sur les territoire afghan'). In Algeria and Somalia (except in Somaliland since 1997) there is not considered to be a de facto power.

### 3. (b)

A certain group becomes a de facto/local authority if they exert a stable power on a given territory, with the ordinary attributes of a power. They must show a minimum organization and the ambition to become a 'legal' authority in the future.

**3. (c)**

All kind of types of information are used (same 2. (c))

**4.**

The joint position is not binding. The Council of State has decided that the Edinburgh Summit Conclusions of 30 November 1992 were not binding (CE 18-12-1996, *Revue française de droit administratif* 13 (2) 281). As a result of this the administration and the jurisdiction do not follow these 'guidelines', but they can be used as reference.

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## Country Report Germany

### Respondents

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### Abbreviations

AsylVfG Asylverfahrensgesetz/Asylum Procedure Law

AuslG Ausländergesetz/Aliens Act

BAFI Bundesamt für die Anerkennung ausländischer Flüchtlinge/  
Federal Office for the Recognition of Foreign Refugees

BVerfG Bunderverfassungsgericht/Constitutional Court BVerfG Entscheidungs-  
sammlung des Bundesverfassungsgericht BVerwG Bundesverwal-  
tungsgericht/Federal Administrative Court BVerwGE Entscheidungs-  
sammlung des Bundesverwaltungsgericht GG Grundgesetz/Constitu-  
tion

InfAuslR Informationsbrief Ausländerrecht

NVwZ Neue Zeitschrift für Verwaltungsrecht

OVG Oberverwaltungsgericht/High Administrative Court

VG Verwaltungsgericht/Administrative Court

VGH Verwaltungsgerichtshof/High Administrative Court

### General remarks

Art. 16a of the Constitution/Grundgesetz (GG) is the starting point when it comes to asylum in Germany. Attention should be had to the fact that this Article is not the implementation of the Geneva Convention. The interpretation of par. 51 sub. par. 1 AuslG must agree with the notion of 'refugee; in Art. 1 A (2), Art. 33 of the Geneva Convention, so it can be said that the Geneva Convention is implemented in par. 51 Ausländergesetz (AuslG). (BVerwG 21-01-1992 NVwZ 1992, p. 676)

This also means that the principle of non-refoulement as laid down in par. 51 sub-par. 1 AuslG and in Article 33 par. 1 of the Geneva Convention extends to a broader group than that referred to in Art. 16a GG.

Par. 51 AuslG provides protection against refoulement, whereas Art. 16a GG provides the right of asylum.

#### 1. (a)

In Germany persecution pursuant to Art. 16a of the German Constitution and par. 51 (1) German Aliens Act must either emanate from the State or at least be imputable to the State.(BverfG 10-07-1989, BVerfGE 80, 315; BVerwG 18-

01-1994, C 48.92: 'Politische Verfolgung ist grundsätzlich staatliche Verfolgung. Das gilt für Par. 51 Abs. 1 AuslG ebenso wie für Art. 16a Abs. 1 GG', BVerwG 04-11-1997 9 C 34.96 'Ein Asylanspruch nach Art. 16a GG und ein Anspruch auf Abschiebungsschutz nach par. 51 Abs. 1 AuslG bestehen nur, wenn der Ausländer von politischer, d.h. staatlicher oder quasi-staatlicher Verfolgung bedroht ist'.) Persecution measures organised by private individuals or groups may fall under the responsibility of the State. (BVerfG 02-07-1980, BVerfGE 54, 341) Such persecution only leads to protection under Articles 16a GG or par. 51 AuslG if, despite its ability to intervene, the State fails to prevent persecution organised by private individuals against a group, thus constituting indirect state persecution. (BVerfG 02-07-1980, BVerfGE 54, 341.)

Of course it is not possible for the government to provide protection at all times. It is sufficient if the government is striving to protect the persecuted group, even though this was not possible. (VG Braunschweig 02-12-1992, 8 A 8644/91) Sometimes a court takes another view, but only very occasionally. There were pogroms in Romania against gypsies. Such actions do not emanate from the State, but from the population itself. By tolerating such pogroms the State authorities are making themselves accomplices. (KreisG. Greifswald 10-05-1992, 1 D 400/91.)

That third party persecution can be persecution in the sense of refugee law, has been accepted, but only if the authorities in some way can be held accountable. If the authorities would try to provide protection, but would fail, they could not be held accountable for acts of persecution by third parties, and such acts can therefore not be considered as persecution. Generally, if the authorities entice, encourage, approve of or in any way tolerate persecution by third parties, this is seen as persecution in the sense of refugee law.

#### **1. (b)**

Persecution does not always extend to the whole of the territory. The courts must examine the existence of a reasonable alternative that consists of finding refuge in another region of the country in every case. (OVG, NRW 24-11-1992, 14A 1054/89.)

The German Federal Constitutional Court considers a person who can find protection against persecution in his own country not in need of protection abroad. This would be the case if he/she has to fear persecution in one part of his/her country but could live without that fear in another part of the country. (BVerfG 10-07-1989, BVerfGE 80, 315.)

However he/she could be expected to move to another part of the country only if it is established that the person would be safe from persecution there and not have to suffer there from other serious disadvantages or dangers which did not exist at the previous residence. Asylum would not be denied if that person



cannot survive economically in the area where he/she would be safe from persecution. (15-07-1997, BVerwG 9 C 2.97 'Das wirtschaftliche Existenzminimum am Ort einer inländischen Fluchtalternative ist nicht danach zu beurteilen, ob sich ein erwerbsfähiger Asylbewerber dort auf Dauer eine Lebensgrundlage durch eigene Erwerbstätigkeit schaffen kann; es reicht aus, dass die wirtschaftliche Existenz auf sonstige Weise gewährleistet ist' also 24-03-1995, BVerwG 9 B 747.94.) Also asylum may not be denied if the asylum seeker would be safe from persecution in certain regions of his country of origin, but would not be able to reach these regions. (BVerwG 13-05-1993, NVwZ 1993, p. 1210.)

Only a person who finds himself in a hopeless situation throughout his entire country of origin can be considered as a politically-persecuted person in the sense of Article 16a GG. This line of reasoning applies as well to par. 51 AuslG.

### 1. (c)

The concept of internal flight alternative is applied irrespective of who the persecutor is. It is applied even if the persecutor is the central State.

### 2. (a)

In Germany the notion of a person threatened by political persecution in the sense of 16a GG presupposes that there is effective State authority over the territory. (BVerfG 10-07-1989, BVerfGE 80, 315) Only persecution emanating from the State 'staatliche Verfolgung' or persecution emanating from a state-like organisation 'quasi-staatliche Verfolgung' can lead to persecution in the sense of 16a GG and par. 51 AuslG. The Federal Administrative Court has upheld recently his jurisprudence that there can be no persecution within the meaning of the Geneva Convention in countries in which there is no government or the government is not effectively in control of the country. (BVerwG 15-04-1997, *InfAuslR* 1997, 397: 'Abschiebungsschutz nach par. 51 Abs. 1 AuslG setzt eine staatlich oder quasi-staatliche Verfolgung voraus'. *Idem* BVerwG 06-08-1994, BVerwGE 101, 328). This was also stated in previous decisions concerning Sri Lanka (BVerwG 18-01-1994, BVerwGE 95, 42 NVwZ 1994, 497, *InfAuslR* 1994, 196) and Somalia (BVerwG 22-03-1994, NVwZ 1994, 1112 *InfAuslR* 1994, 329).

Such State authority is lacking in the event of civil war (BVerwG 21-01-1992, BVerwGE 89, 296) (also 2 (d)).

The requirement for effective state authority over the territory is not made in the case where the forces of the State would physically resort to exterminating their civil war adversaries. (BVerfG 10-07-1989 BVerfGE 80, 315.)

The situation is not as clear-cut in a country undergoing political change.

If the state authority is replaced by the forces of a third country, political persecution in the sense of the Constitution is possible.

## **2.(b)**

There is considered to be no effective state authority in:

Somalia: Since the breakdown of the government of Siad Barre in Januari 1991 until now. The UN forces in Somalia were not considered as state authorities which would permit political persecution to be established.

Afghanistan: Since the breakdown of the Communist government under Nadjibullah in April 1992 until now.

Claims of persecution in the above mentioned countries are not recognized.

In Liberia for a long time there was considered not to be an effective government since the start of the civil war in December 1989. Recently decisions have been taken considering the government from Taylor as effective government. (OVG Nordrhein-Westfalen, 16-12-1997 23 A 5503/95. A.)

## **2. (c)**

Every source of information is used. This information ranges from government reports to reports from Amnesty International, university institutes, churches, UNHCR, private individuals or organizations, press releases and so forth.

## **2. (d)**

Par. 51 AuslG does not result in protection for refugees fleeing the violence of civil war. (BVerwG 22-03-1994, 9 C 443.93: 'Der Begriff des von politischer Verfolgung Bedrohten im Sinne des para 51 Abs. 1 AuslG setzt als staatliche Verfolgung grundsätzlich die effektive Gebietsgewalt des Staates voraus, an der es in Bürgerkriegsgebieten regelmässig fehlt.') Protection is only afforded within the limited framework of political persecution.

Sometimes due to the political opinions attributed to individuals by the belligerents, persecution may extend to the whole territory.

In the event of civil war, the right of asylum cannot be granted to an asylum-seeker since there is no state authority (also under 2 (a)).

People fleeing from civil war may be granted temporary protection. There are various ways to do so. First of all, the *Länder* Ministers of Interior could stay deportation orders for certain groups of aliens from specific countries on the basis of art. 52 AuslG. The Federation and the *Länder* could also agree on granting provisional residence permits (*Aufenthaltsbefugnis*) on condition that they renounce their request for asylum (par. 32a AsylVfG). If there are no general regulations granting temporary protection – which is the rule – the alien could get protection against deportation on the basis of art. 53 par. 6 of the AuslG, but only if on return he would be exposed to an extreme danger for life

or bodily integrity ('sicherer Tod oder schwerste Korpervverletzungen'). There is also the possibility to get a toleration permit from the authorities on the basis of art. 55 par. 4 of the AuslG if no deportation is possible for legal or factual grounds: thus, Afghans and Somalis, for instance, may get toleration permits ('Duldung') because there are no flights to Mogadishu or Kabul for the time being.

If a civil war leads to the impotence of the state authority there cannot be persecution perpetrated by the State. And if there cannot be persecution attributed to the State, there cannot be persecution. The probability of persecution due to an outbreak of civil war and an unstable situation is not sufficient to warrant asylum.

The competent court is obliged to establish that the State is either conducting a merciless battle with the aim of physically annihilating the enemy in a way that gives entitlement to the right of asylum (BVerfG 10-07-1989 BVerfGE 80, 315 (340) or is conquering certain territories in order to enable it to carry out political persecution by virtue of its position of superiority (BVerfG 10-07-1989 BVerfGE 80, 315). Furthermore, even if such a situation is accepted, the possibility of internal flight must be taken into consideration. (See 1 (b)).

### **3. (a)**

In principle it is recognized that there may be persecution by local/de facto authorities. (BVerwG 15-04-1997 BVerwGE 101, 328 InfAuslR 1997, 379 '....so könnten Zurechnungsobjekt einer Verfolgung im asylrechtlichen Sinne auch nichtstaatliche Kräfte sein. Massgebliches und das Erfordernis des Bestehens organisatorischer Strukturen ergänzendes Kriterium für ein staatsähnliches Machtgebilde sei die prinzipielle Gewährleistung einer regional wie personal übergreifenden Friedensordnung. Dadurch unterscheidet sich ein zu asylrechtlich relevanter Verfolgung fähiges Herrschaftsgebilde etwa von blossen Einflussbereichen, Hauptquartieren oder sonstigen machtsicherenden Gebietsstrukturen, die von Rebellenführern, Clanchefs oder sonstigen Potentaten errichtet würden'.) This is the case when the local/de facto government has pushed the central government aside or if the central government has left its authority in the hands of the local/de facto government.

### **3. (b)**

The criteria under which de facto authorities are recognized as such are rather strict. They must be in control effectively of the entire country or part of it; they must have established certain administrative and judicial structures; their power has to be of a certain stability and duration. (BVerfG 06-08-1996 9 C 172.95 'Quasi-staatlich ist eine Gebietsgewalt nur, wenn sie auf einer staatsähnlich organisierten, effektiven und stabilisierten Herrschaftsmacht beruht. Quasi-

staatlich ist eine Gebietsgewalt nur, wenn sie – ähnlich wie bei Staaten, die eine organisierte Herrschaftsmacht mit einem prinzipiellen Gewaltmonopol auf einem begrenzten Territorium über ihre Bevölkerung effektiv und dauerhaft ausüben – auf einer organisierten, effektiven und stabilisierten territorialen Herrschaftsmacht beruht. Dabei erfordern Effektivität und Stabilität eine gewisse Stetigkeit und Dauerhaftigkeit der Herrschaft, verkörpert vorrangig in der Durchsetzungsfähigkeit und Dauerhaftigkeit des geschaffenen Machtsapparates.’ Idem BVerwG 15-04-1997 InfAuslR 1997, 379 BVerwG 04-11-1997 9 C 34.96)

The Federal Administrative Court has just denied the existence of such state-like powers in Afghanistan (BVerwG 04-11-1997 9 C 34.96)

### 3. (c)

To establish whether a power is considered a state like authority all available information is used. (also 2. (c))

### 4.

Until now there has been only one reference to the Joint position. This has been in a decision of the Federal Administrative Court. (BVerwG 15-04-1997 BVerwGE 101, 328 InfAuslR 1997, 379: ‘Der Senat sieht sich in seiner Ansicht, dass das von ihm gefundene Auslegungsergebnis auch heute noch der Auffassung der Regierungen der meisten Vertragsstaaten und der überwiegenden Staatenpraxis entspricht, schliesslich durch den ‘Gemeinsamen Standpunkt’ des Rates der Europäischen Union vom 4. März 1996 (betreffend die harmonisierte Anwendung der Definition des Begriffs ‘Flüchtling’ in Art. 1 des Genfer Abkommens vom 28. Juli über die Rechtsstellung der Flüchtlinge, Amtsblatt der Europäischen Gemeinschaften vom 13. März 1996 L 63/2) bestätigt.’)

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## **Country Report Italy**

### **Respondents**

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C. Hein (Consiglio Italiano Per I Rifugiati)

S. Sonnino (Commissione Centrale per il Riconoscimento dello status di Rifugiato) E. Ricci (Amnesty International) reader

### **Abbreviations**

CS Council of State

MD Ministerial Decree

RAC Regional Administrative Court

### **General remarks**

At the moment there is no specific asylum law. There is only the 'legge Martelli' on Immigration, which includes some articles about asylum (Norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato). This 'legge Martelli' follows the international standards of refugee law eg. the non-refoulement principle.

The Martelli law was introduced in 1990 to abandon the geographical reservation to the Geneva Convention. Until 1990 the Italian government decided only on asylum claims from European claimants due to the geographical limitation. Non-European asylum seekers had to turn to the UNHCR for help, but they could do little. The Italian strategy towards refugees was to receive them temporarily. Now the Italian government approved a new asylum-law-draft at the end of April 1997, approved by the Chamber of Deputies and waiting to be discussed in the Senate.

The Italian Constitution provides a very generous definition of the term refugee. According to 10:3 of the Italian Constitution the foreigner who is denied in his own country the effective exercise of democratic freedoms provided for by the Italian Constitution, has a right to asylum in the territory of the Republic in accordance with the provisions of law.

But there is no law to apply this principle. The constitutional principle is also not mentioned in the new asylum-law-draft.

Concerning the subject origins of persecution, there is no specific regulation about this topic. The Government has never issued precise instructions (for instance through circular letters) on this matter. The only way to ascertain how the Italian authorities apply this criterion is going through the decisions taken by the Commissione Centrale per il Riconoscimento dello status di Rifugiato (Central Commission for the Eligibility to refugee status) in individual cases.

The deliberations and decisions of the 'Commissione Centrale per il Riconoscimento dello status di Rifugiato' are not made public, and it is not possible to obtain any individual decisions without the permission of the persons concerned.

Due to all this it is not easy to make an in-depth analysis of the definition of a refugee in Italy because there is no significant case law, and individual decisions cannot be consulted.

**1. (a)**

To be recognized as refugees under the Geneva Convention, asylum seekers must demonstrate that the persecution has to come from State authorities, or at least, if persecution is generated by non- state agents has to be tolerated by State authorities. Therefore, such groups as victims of civil war (like) situations are hardly recognized as refugees.

Often people with such a motivation are rejected. Whether or not persecution by third parties is relevant under Italian law remains to be seen. A recent decision on a Peruvian who states to have been persecuted by Sendero Luminoso did not exclude the possibility of his being relevant: the case was rejected on the basis of an individual motivation. (case reported to us by Amnesty International) But negative decisions have been made in the vast majority of cases concerning Algerians, who suffered persecution in the country of origin due to actions of non-governmental agents. Because those activities were opposed by the official Algerian authorities, and those were in the case not tolerating the persecution there could not be persecution in the sense of the Geneva Convention.

**1. (b)**

The existence of an internal flight alternative in the country of origin should not preclude someone from refugee status. No cases are known to the respondent in which the internal flight alternative has been applied. The internal flight alternative is only one element but not a decisive one.

**1. (c)**

See under 1 (b)

**2 (a)**

In the case of Albanians, they were allowed to the asylum procedure. Most of them are not recognized, but that does not depend on the fact that they had no government.

**2. (b)**

Somalia after the fall of Siad Barre.

**2. (c)**

UNHCR databases, public information available and reports from the respective Italian embassies provided through the ministry of Foreign Affairs.

**2. (d)**

Usually, they obtain a temporary protection. This applied to Somalians, Ex-Yugoslavians, and recently Albanians. Every category gets its own permit, established by Ministerial Circulaires or Directives to Police Officers.

In the case of the Somali's it lasted some years, also for the Bosnian people. The Albanians are already being repatriated.

The fact that an applicant comes from a country or region involved in a civil war does not exclude application of the Refugee Convention. However, as recognition rates are low for applicants from countries in civil war, it seems that criteria are more strictly applied. An applicant should have held an important position, or there should be something special about his/her case, which differentiates him/her from the rest of the population. 'Normal 'suffering' as a result of a civil war is insufficient; this is seen as a result of the overall situation of disorder. (CIR 13-06-1995 'Considerato che tale condizione oggettiva, a carattere generalizzato, non rileva, ai sensi della Convenzione di Ginevra 28.7.1951, ai fini del riconoscimento dello status di rifugiato, non potendosi individuare motivi di persecuzione riferibili in via diretta e personale secondo la nozione contenuta nell'art. 1 della predetta Convenzione'.) The position of the Commission in these cases closely resembles that of the ECHR in the *Vilvarajah* decision of 20 October 1991 (personal position was not worse than the generality of the other members of the group; no special distinguishing features). This could explain why so few Somalians are recognized as refugees, although the seriousness of their situation is implicitly recognized through their special (and, when compared to other groups receiving special treatment, quite favourable) regulation.

Those found ineligible for refugee status can obtain a sojourn permit on humanitarian grounds. A recommendation will be made by the Central Eligibility Commission to the competent Questera (Police Office) to issue such a sojourn permit on humanitarian grounds.

In one case a whole group, coming from a situation of civil war, was considered to be refugee: the Iraqi Kurds during the Gulf war. However, they were considered as refugees not on the basis of group determination, but on a case to case basis.

Even if there is no longer a central government one may apply for asylum.

**3.**

Since there is no clear law, it is difficult to answer. To have a central government does not seem to be a requirement for the applicability of the Geneva Convention.

**3. (b) and (c)**

Not applicable.

**4.**

Until now, the Commissione Centrale per il Riconoscimento dello status di Rifugiato has made no explicit reference to the joint position.

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## Country Report the Netherlands

R. Bruin (Amnesty International, Dutch Section) reader

### Abbreviations

AB	Administratiefrechtelijke Beslissingen
ABRvs	Afdeling Bestuursrechtspraak van de Raad van State/ Council of State, Administrative Jurisdiction Section
ARRvS	Afdeling Rechtspraak van de Raad van State/ Council of State, Jurisdiction Section
GV	Gids Vreemdelingenrecht
HR	Hoge Raad/Supreme Court
NAV	Nieuwsbrief Asiel- en Vluchtelingenrecht
REK	Rechtseenheidskamer/District Court The Hague
RV	Rechtspraak Vreemdelingenrecht

### 1. (a)

The agent of persecution may be the government in the country of origin, as well as other persons or groups in society. In the latter case, attention will be given to the reaction of the national authorities.

If the national authorities are unwilling or incapable of protecting the applicant against third persons, he or she will have a well-founded fear of persecution. (HR 15-01-1993, RV 1993, 16.) There may be persecution if the government is unable to protect a group in society against acts of violence committed by their fellow citizens. (ARRvS 18-08-1978, RV 1978, 30.) The Council also considered the fact that if effective protection was absent during a short period only, this was insufficient to establish persecution. (ARRvS 02-08-1988, RV 1988, 5 GV D12-149.) In the same year, the Council returned to the former criterion that people whose – well-founded – fear of persecution is based on acts of persecution by one or more persons or organizations, whose activities cannot be attributed to the central authority, but against whom that authority does not want or is unable to grant protection can also be considered as refugees. (ARRvS 20-04-1988, RO2.85.0434.)

In November 1995, the Council of State changed its jurisprudence, at least in the case of absence of government, and ruled in a case concerning a Somalian asylum applicant that the term ‘persecution’ has been interpreted in constant case law in such a way that this must be understood as persecution by some government agent, or by others, against which the government is unwilling or unable to provide sufficient protection.

According to the present interpretation of the Council, there can be no question of persecution if, in the country of origin of the applicant, there is no

government. The Council also notes that this view is in accordance with the case law of central administrative judicial authorities in France and Germany, both of which are a party to the Schengen Treaty. (ARRvS 06-11-1995, RV 1995, 4.)

**1. (b)**

An internal flight alternative can be a blockade for refugee status. (ARRvS 18-08-1978, RV 1978, 30, AB 1979, 159, GV D12-16; ABRvS 21-09-1994, RV 1994, 7) It is only recognized if the persecution was instigated by others than the authorities. (ARRvS 08-06-1993, GV D12-232; Rb. Den Haag zp Zwolle 25-06-1997.) This line of reasoning is followed consequently.

As a result, persecution of a Turkish Kurd by local authorities, or by death squads, or persecution by Srilankan authorities on Northern Sri Lanka, precluded an assumption that there was an internal flight alternative.

The decisive question is whether the authorities are willing and able to provide protection against non-authority persecution elsewhere. Subjective elements play no role; a deterioration of the economic or social conditions under which the applicant will have to live in another part of the country plays no role.

**1. (c)**

If the persecutor is the central government there can be no internal flight alternative. (ARRvS 14-09-1988, RV 1988, 6 Rb. Den Haag zp Zwolle 25-06-1997: 'Naar het oordeel van de rechtbank kan geen sprake zijn van een binnenlands vluchtalternatief in situaties waarbij de vervolging door de autoriteiten zelf plaatsvindt.') It is only applied when there is persecution by third parties or a de facto authority.

**2. (a)**

According to the Council of State there cannot be persecution in the sense of the Geneva Convention if there is no government in the country of origin of the asylum-seeker. (ABRvS 06-11-1995, RV 1995, 4: 'Indien in het land van herkomst geen overheid bestaat, kan van vervolging in de zin van het Verdrag en de Vreemdelingenwet geen sprake zijn', Second Chamber of Parliament TK 1995-1996, Kamervraag 915, ABRvS 21-03-1997, NAV 1997, nr. 4, bijlage 13, p. 405-409: 'Uit het vorenstaande volgt dat in Afghanistan ten tijde van de bestreden beslissing iedere vorm van feitelijk overheidsgezag ontbrak. Ook het vluchtrelaas van appellant biedt geen aanknopingspunten voor een ander inzicht. Dit inzicht voert, gelet op hetgeen hiervoor is overwogen, tot het oordeel dat verweerder appellant – zij het op andere gronden – terecht niet heeft aangemerkt als vluchteling'.) Even if an asylum seeker has well-founded fear of persecution.

In a later decision the REK mentions (the Council of State is no longer the highest Administrative Court) that it is not convinced that the fact that there is no government in the home country of the asylum seeker should preclude him from refugee status. (REK 11-07-1996 RV 1996, 9) In the same decision the REK accepted the existence of new (local) governmental structures in Somalia since May 1995. There seems to be a divergence in interpreting this part of the refugee definition and the different courts seem to hold a different opinion.

According to the practice of the Ministry of Justice the mere fact that there is no government does not preclude one from refugee status. (See in the case of Afghanistan 'IND-Werkinstructie nr. 39', and in the case of Somalia 'IND-werkinstructie nr. 47'.)

Recently the District Court of Zwolle referred a case to the Chamber for the Unity of jurisprudence (REK) for a more precise ruling on the issue (Decision of 11-02-1998, Awb 97/2858 VRWET Z VS, not published).

## **2. (b)**

The Council of State has had to look at the absence of a government and refugee status in different cases. In the case of Lebanon, the fact that there was no actual government was not seen as decisive to come to the conclusion that one should speak of refugees. (ARRvS 31-01-1984, GV D12-99.)

In the case of Liberia the Council decided until now there could be a Convention refugee coming from Liberia. (ABRvS 21-09-1994, RV 1994, 7.) This line of reasoning has been followed even after the judgements of ABRvS 19-03-1997, RV 1997, 2 and ABRvS 21-03-1997, NAV 1997 no. 4, bijlage 13, p. 401-409. In later decisions Liberia is considered to have de-facto government in the surroundings of Monrovia.

Concerning Somalians the Council has decided that the government had lost control. It leads only to the conclusion that flight motives related to the old regime could not lead to refugee status. The absence of a government is not objected to. (ABRvS 14-04-1994 GV 18a-5 en GV 18a-6.)

There is considered to be no effective state authority in

Afghanistan: Since 16 August 1992 until now.

Somalia: Since the breakdown of the government in 1991 there was considered to be no effective state authority. Since July 1993 there is effective authority in Somaliland and since January 1997 there is also effective authority in Bari, Nugaal and Mudug. In the other parts of the country there is no effective authority.

**2. (c)**

Any kind of relevant information is used. The reports from the Ministry of Foreign Affairs, press releases, information from Amnesty International and the UNHCR and other NGO's as well as all other available information.

**2. (d)**

The Council of State has never decided that the fact that an applicant comes from a situation of civil war precludes the applicability of the Refugee Convention. In jurisprudence it is decided that if there are mutually warring groups (such as in Lebanon), this was insufficient for refugee status. The general situation in a country (like civil war) in itself is insufficient for refugee status. Cases from such countries are decided on a case to case basis, and the asylum seeker has to establish fear of persecution.

**3. (a)**

There is the possibility of persecution by local/de facto authorities.

The Ministry has issued so-called Instructions (for instance in the case of Afghanistan there is a so called 'IND-Werkinstructie nr. 39', and in the case of Somalia 'IND-werkinstructie nr. 47', these instructions give information under which circumstances an asylum seeker coming from Afghanistan or Somalia could be granted refugee status, e.g. in the working instruction regarding Somalia it is stated that the ministry of Foreign Affairs decided that new local governmental structures exist in Somalia since May 1995). People from Afghanistan and Somalia can be recognized as refugees. From these it is to be understood that asylum seekers from Somalia and Afghanistan can be recognized as refugees.

Particularly concerning Somalia the Ministry of Justice applies a delicate balancing between the different (court) positions. While according to REK 11 July 1996 (based on the information of the Ministry of Foreign Affairs) new governmental structures exist in Somalia since May 1995, only applicants who filled their request before 17 May 1995 are excluded from the refugee status in accordance with the decision of the Council of State of 6 November 1995 (see IND-Werkinstructie nr. 106). In conformity with a later decision of the Council of State of 19 March 1997 in which the Council of State accepted also de facto authority in certain parts of Somalia since July 1993, asylum seekers from these areas are only excluded from the refugee status if they filled their request before 1 July 1993 (IND-Werkinstructie nr. 126). According to these subsequent Instructions the practical effect of the restrictive ruling of the Council of State of 6 November 1995 rendered more or less null and void.

**3. (b)**

The criteria applied by the Council of State can be found in jurisprudence of the Council. The de facto-government has to have established certain administrative, judicial and political structures. Those structures must lead to the forming of organs who can perform essential tasks like providing education and medical care, administration of justice, collect taxes etc. (ABRvS 19-03-1997, RV 1997, 2 and ABRvS 21-03-1997, NAV 1997, no. 4, bijlage 13, p. 405-409: '... een regering en politiemacht tot stand zijn gekomen, alsmede een beleidsformulerend en uitvoerend bestuurlijk apparaat, die in staat worden geacht om essentiële administratieve taken inzake onder meer rechtspraak, belastingheffing, onderwijs of medische zorg stelselmatig uit te voeren.')

**3. (c)**

See above at 2. (c)

**4.**

The Joint Position is cited in jurisprudence. (ABRvS 19-03-1997 RV 1997, 2 and ABRvS 21-03-1997 NAV 1997 no. 4, bijlage 13 p. 401-409 'Met deze definitie van de term 'vervolging', welke aansluit bij het volkenrechtelijke leerstuk van de staatsaansprakelijkheid, komt overeen het inmiddels door de Raad van de Europese Unie op 4 maart 1996 vastgestelde Gemeenschappelijk Standpunt (...) dat ingeval van burgeroorlog of andere gewelddadige interne of wijdverbreide conflicten vervolging kan uitgaan van het wettig gezag of van door het wettig gezag aangemoedigde of gedoogde derden, dan wel van een autoriteit die over een deel van het grondgebied, waarbinnen de staat geen feitelijke bescherming kan bieden aan zijn onderdanen het feitelijk gezag uitoefent.') The mentioned paragraphs of the Joint Position have also been used by the governments in cases when they had to answer questions asked by a member of parliament about their refugee policy. (Second Chamber of Parliament TK 1995-1996 23490 nr. 40.)

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## Country Report Sweden

### Respondents

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C. Söderbergh (UNHCR)

### Abbreviations

AA Aliens Act with amendments October 1997  
AAB Aliens Appeals Board  
SIB Swedish Refugee Board

#### 1 (a)

Following amendments voted in the Parliament on 10 December 1996, a revised Aliens Act entered into force on 1 January 1997. According to these changes, the Convention refugee definition applies regardless whether the persecution is carried out by the authorities of the country or by non-state agents.

Prior to the amendment the Swedish government had held that only persecution emanating from state actors would be ground for refugee recognition. But now it is explicitly stated in chapter 3, section 2 of the AA: 'The term refugee as used in this Act refers to an alien who is outside the country of his nationality, owing to a well founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. *This applies irrespective of whether persecution emanates from the authorities of the country or these cannot be expected to offer protection against persecution by individuals.*'

Prior to this amendment, the Swedish government's position was that persecution had to emanate from state authorities or the latter had to knowingly abstain or lack possibility to protect its nationals from persecution.

#### 1 (b)

The law itself does not mention anything about the possibility of an internal flight alternative. However, in the legislative proposal presented to parliament of the new law it is mentioned that it is of specific interest to assess whether the applicant has had the possibility of internal flight, in which case there is no need for protection in Sweden. The notion is applicable when applicants have the possibility to live and receive protection in one part of the country, enjoy freedom of movement and other fundamental human rights and can reach this area in safety.

In practice it would appear that it has been argued that applicants have the possibility of internal flight mostly where the claimed persecution is emanating from non-state agents (e.g. Peruvians claiming persecution by 'Sendero Luminoso', Colombians claiming persecution by guerrilla- and para-military groups etc.). However according to recent information the Swedish authorities have granted Convention status in a few cases of Somalis belonging to an ethnic minority claiming persecution by other Somali clans.

#### **1 (c)**

Nothing is mentioned here whether this concept should be applied in circumstances of persecution emanating from the state or from non-state agents. The notion is used in situations where the person concerned is fleeing persecution from state authorities, local authorities (e.g.. Kurds fleeing from South-East Turkey) or third parties.

The authorities seem to attach more weight to the question whether protection de facto is available within the boundaries of the country of origin, than who the persecutor is. The notion of internal flight alternative was used in some cases concerning Somalians who could find protection from persecution in areas in the country controlled by their particular ethnic group.

#### **2. (a)**

The legislative proposal mentions that a widened definition of the term refugee should also entail the possibility to consider applicants who claim persecution by a country without a government. Prior to the amendments of the Aliens Act in 1997, the governments considered that the 1951 Convention was not applicable in situations where no central government exist; a reasoning which was applied in cases concerning asylum seekers from Somalia.

This restrictive interpretation has now been abandoned.

#### **2. (b) and (c)**

Not applicable in the light of the answer to 2. (a)

#### **2. (d)**

As a new form of subsidiary (or b-status) protection the Aliens Act groups three categories 'in need of protection': (Chapter 3 section 3 A.A.)

- those with a well-founded fear of facing the death penalty, corporal punishment, torture, other cruel, inhuman treatment or punishment
- those who cannot return to their country of origin on account of environmental disaster or those in need of protection because of external or internal armed conflict



- those with a well-founded fear of persecution because of their gender or homosexuality.

Since July 1994, the law also provides for temporary protection. It was introduced to cover cases where applicants may not be eligible for refugee or de facto status, or now recognized as in 'need of protection' under the amendment to the Aliens Act, but are in need of short term protection. Since 1 January after the amendment of the law according to chapter 2, section 4a the government may issue prescriptions concerning temporary residence permits regarding a certain group of aliens. An applicant who is judged to have a need of temporary protection may be granted a temporary permit. Temporary protection can be granted initially for two years, with the possibility of renewal for another two years. Asylum seekers fleeing a civil war situation can also be considered in need of protection and be granted a permanent residence permit, but the government may apply restrictions.

The Governments may in some situations restrict the application of Article 3:3. Thus, according to Article 3:8 of the Aliens Act, the government may prescribe that a residence permit shall not be granted to a person escaping armed conflict or environmental disaster if reception conditions in Sweden justify this.

### **3. (a)**

As described above, following the amendment of the Aliens Act in 1997, persecution by de facto or local authorities is considered to fall under the scope of Article 1 A of the Geneva Convention. Likewise, the existence of a recognised central government is not a requirement for the application of the Convention.

### **3. (b) and (c)**

Not applicable.

### **4.**

The Joint Position is not cited in Swedish case law according to the information the respondents have. But certainly the EU level policy formulations had an impact on Swedens amendments to the Aliens Act. It should be noted that the Swedish government at the meeting of the Council submitted a declaration on the Swedish interpretation of the term persecution by third parties. The declaration is consistent with the amendment of Article 3:2 of the Aliens Act.

### **Literature**

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## Country Report Switzerland

### Respondents

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A.G. Nielsen (Office Fédéral des Réfugiés)

M. Morf (Office Fédéral des Réfugiés)

C. Cotting Schalch (Commission suisse de recours en matière d'asile/Schweizerischen Asylrekurskommission)

### Abbreviations

AF	Arrête fédéral/Federal Decision
AsylG/LA	Asylgesetz/Loi sur l'asile du 5 Octobre 1979/Asylum Law
CF	Conseil Fédéral/Federal Council
EMARK/JICRA	Entscheidungen und Mitteilungen der Schweizerischen Asylrekurskommission/Jurisprudence et informations de la Commission suisse de recours en matière d'asile
CSRA/SARK	Commission suisse de recours en matière d'asile/Schweizerischen Asylrekurskommission/Appeal Board
ODR	Office Fédéral des Réfugiés/Federal Refugee Office

### 1 (a)

Article 3 par. 1 and 2 of the Asylum Law/Asylgesetz/Loi sur l'asile du 5 Octobre 1979 gives the definition of a refugee: 'Flüchtlinge sind Ausländer, die in ihrem Heimatstaat oder im Land, wo sie zuletzt wohnten, wegen ihrer Rasse, Religion, Nationalität, Zugehörigkeit zu einer bestimmten sozialen Gruppe oder wegen ihrer politischen Anschauungen ernsthaften Nachteilen ausgesetzt sind oder begründete Furcht haben, solchen Nachteilen ausgesetzt zu werden. Als ernsthafte Nachteile gelten namentlich die Gefährdung von Leib, Leben oder Freiheit sowie Massnahmen, die einen unerträglichen psychischen Druck bewirken.'

Persecution has to be imputable to state organs. The persecution does not have to emanate from the organs directly ('unmittelbare staatliche Verfolgung') but can also emanate from them indirectly ('mittelbarer staatlicher Verfolgung'). This indirect persecution can be persecution by non-state agents. Persecution in the sense of the Geneva Convention can occur when the state encourages, tolerates, or indicates that they are not willing to provide protection against persecution. (ARK 11-03-1996, I/N 250 200: 'Statt jedoch selbst aktiv zu werden, kann der Staat es aber auch unterlassen, der Schutzpflicht, die er gegenüber seinen Bürgerinnen und Bürger hat, nachzukommen, indem er Übergriffe Dritter anregt, unterstützt, billigt oder tatenlos hinnimmt, weil es ihm am Willen fehlt, die betroffene Bevölkerungsgruppe zu schützen.' ARK 29-06-1995, EMARK

1995 no. 25: ‘ Eine asylrechtlich relevante Verfolgung liegt vor, wenn diese vom Staat ausgeht, sei es unmittelbar durch dessen Organe, sei es mittelbar durch Dritte, deren Handlungen vom Staat angeregt, gebilligt, unterstützt oder – obwohl zur Schutzgewährung in der Lage – tatenlos hingenommen werden. Einer staatlichen Verfolgung gleichgesetzt ist diejenige durch eine aufständische Gruppierung, welche dauerhaft und effektiv die faktische Herrschaft über das von ihr kontrollierte Territorium ausübt. Verfolgungshandlungen, die weder direkt noch indirekt einem staatlichen oder quasi-staatlichen Urheber zuzurechnen sind, können nicht zur Anerkennung der Flüchtlingseigenschaft führen.’).

If the State is simply unable to provide protection this cannot lead to refugee status. (ARK 10-01-1995, EMARK 1995, no. 2: ‘Staatliche Untätigkeit ist dann keine Verfolgung, wenn sie auf staatlicher Unfähigkeit beruht. Die Diagnose der Schutzunfähigkeit setzt die genaue Kenntnis der Übergriffe privater Dritter und der Reaktionsmöglichkeiten des betroffenen Gemeinwesens voraus, damit entschieden werden kann, ob der Staat nicht eingreifen wollte oder nicht eingreifen konnte.’) The asylum seeker has to prove that persecution was covered by the state authorities or that the state was unwilling to offer protection to the persons affected. (IJRL 1990, p. 650.)

The attitude of the state authorities is taken into account as an objective element in gauging their desire and ability to offer protection to persecuted people. Intervention by the Turkish state authorities was lacking in the case of religious persecution of syro-orthodox Christians by third parties. This has been considered to be indirect state persecution. (CRA 7 December 1992, JICRA, 1993, No. 9.)

In addition, excesses must attain a certain intensity to be qualified as serious disadvantages. Death threats, insults etc. were not sufficient.

In Algeria there was no persecution by Muslim groups because the State was willing to protect (ARK 06-06-1995, EMARK 1996, no. 28: ‘Die von islamitischen Gruppierungen ausgehenden Benachteiligungen oder Drohungen sind in der Regel asylrechtlich nicht relevant, da die algerischen Behörden grundsätzlich schutzbereit sind.’)

If persecution is the work of private individuals, it must be imputed to the state in order to produce the effects leading to recognition.

### **1. (b)**

An internal flight alternative can preclude from refugee status. There has to be the possibility to have an existence with human dignity and also there has to be effective protection from persecution. Simply the deterioration of living circumstances will not lead to the conclusion there cannot be an internal flight alternative. (CSRA 28-10-1993, JICRA 1993, no. 37 : ‘L’existence d’une alternative de fuite interne exclut la reconnaissance de la qualité de réfugié. Cette consé-

quence suppose cependant que la personne concernée puisse mener, dans une autre partie du pays, une existence conforme à la dignité humaine.’ CSRA 28-11-1995, JICRA 1996 no. 1: ‘...une possibilité de refuge interne soit exclue, autrement dit que le demandeur soit dans l’impossibilité de trouver une protection effective dans une autre part du pays d’origine contre des persécution. Les exigences pour que soit garantie une réelle protection sont élevées. Si l’on peut constater sur le lieu de refuge une protection effective contre les persécutions, on peut retenir l’existence d’une possibilité de fuite interne – la reconnaissance de la qualité de réfugié étant exclue dans ce cas – en dépit de conditions de vie défavorables (en termes d’intégration culturelle ou religieuse, ou en termes d’emploi) peuvent y régner.’)

**1. (c)**

If the central government is the persecutor there cannot be an internal flight alternative. The internal flight alternative is usually applied in cases of de facto/local authorities. (ARK 28-11-1995, EMARK 1996, no. 1: ‘...fällt eine innerstaatliche Fluchtalternative somit nur in Betracht, wenn die Verfolgung nur regional am Herkunftsort von Polizei-, Militär- oder Zivilbehörden ausgeht, welche der Zentralstaat nicht wirksam von Amtsmissbräuchen abhalten kann, resp. bei Verfolgung durch private Dritte, welche in einem bestimmten Gebiet nicht an Übergriffen eine ethnische oder religiöse Minderheit gehindert werden können.’ ARK 30-01-1997 EMARK 1997 no. 12 ‘Eine innerstaatliche Fluchtalternative setzt einen wirksame Schutz vor unmittelbarer und mittelbare Verfolgung am Zufluchtort voraus. Dabei obliegt es der entscheidende Behörde, eine derartige Effektivität des Schutzes – woran hohe Anforderungen zu stellen sind – abzuklären und zu begründen.’)

**2. (a)**

Because there has to be indirect state responsibility to apply the Convention refugee definition, someone from a country without a central/local/de facto government cannot be a refugee. (CSRA 29-06-1995, JICRA 1995, no. 25)

**2. (b)**

The CSRA has decided that in Somalia there has been a situation of anarchy since the end of 1990 and there is no normal state authority and exercising powers. This stands until this day, the last jurisprudence confirming this view dates from 14-05-1997. So there cannot be persecution in the sense of the Geneva Convention. (CSRA 29-06-1995 JICRA 1995 no. 25 ‘La Somalie est confrontée à une situation d’anarchie et ne peut donc être assimilée à un Etat normalement constitué (doué de la puissance publique et organisé pour exercer celle-ci) qui aurait failli à son devoir de protection.’)

**2. (c)**

Every kind of available information is used. This information ranges from own research, information from NGO's etc. For instance the case concerning Somalia (CSRA 29-06-1995, JICRA 1995, no. 25, see above) the judges looked at 1144 documents concerning the situation in Somalia to come to their conclusions.

**2. (d)**

In general, a civil war does not give entitlement to refugee status because the persecution is not targeted and the misfortune concerns the whole population of a country. A Liberian national, referring to the civil war and the conditions in general in his country, was not recognized. (CSRA, 24 January 1994, N 242106.)

If persecution is not targeted given the fact that the situation in the region where the asylum seeker comes from is practically a civil war (Turkish and neighbouring provinces in a state of siege), there is no persecution in the sense of Article 3 LA. (ARK 28-10-1993, EMARK 1993, no. 37: 'Die bürgerkriegsähnliche Situation in den unter Ausnahmezustand stehenden Provinzen und daran angrenzenden Teilen der Türkei stellt mangels Gezieltheit keine Verfolgung im Sinne von Art. 3 AsylG dar.')

Asylum was granted to a Bosnian couple who were victims of severe persecution by the state police and de facto forces. This was persecution in the sense of Article 3 LA because Serbian troops in Bosnia, and later Croatian troops in Croatia – the country where the couple had sought refuge – persecuted these people because of their religion. Bosnian Muslims may benefit from the right to asylum if their situation is not the result of general civil war conditions but of persecution and 'targeted harassment' (gezielte Eingriffe). (ARK 28-05-1997, EMARK 1997, no. 14: 'Die geschehnisse, welche die Bevölkerung von Srebrenica vom 11. Juli 1995 an erleiden musste, können nicht den 'gewöhnlichen' Folgen eines Krieges gleichgesetzt werden. Vielmehr erfüllen sie in bezug auf Intensität, Motiv und Urheberchaft die gesetzlichen Erfordernisse von 'ernsthaften nachteilen' im Sinne von Artikel 3 AsylG. Da die Verfolgung durch die Serbischen Truppen auf systematische, organisierte und massive Weise verübt wurde und sie sich unterschiedslos gegen jeden Muslim im betreffenden Gebiet richtete, kommt ihr kollektiver Charakter zu.')

In the cases where asylum is not granted asylum seekers are obliged to leave the country, but in the case of a civil war very often a provisional measure is taken ('Provisional admission/Vorläufige Aufnahme'). The asylum seekers are allowed to stay until it can be expected of them to return to their country.

At the moment the Parliament is discussing a revision of the aliens law, and among the proposals is the making of a new statute, in which a temporary resi-

dence permit can be granted to those fleeing war, civil war or generalized violence.

### **3. (a)**

In a decision of the CSRA it is said that persecution by de facto/local authorities is possible. (CSRA 10-01-1995, N 271248.) They speak of quasi-state persecution. The state of origin's inability to provide protection against persecution by organized groups which, without forming part of the public authorities, exercise de facto power over part of the national territory and the population living there, must be classified as persecution by the state. A Muslim from Mostar – a city divided between the Croats and Bosnians – was recognized as a refugee because of his detention and mistreatment by Croat forces. (CSRA 10 January 1995, JICRA, 1995, No. 2 : 'Les persécution imputables à des groupes organisés qui, sans être revêtés de la puissance publique, exercent un pouvoir de fait sur une partie déterminée du territoire national et de la population qui y réside doivent être assimilées à des persécutions exercées par l'Etat; on parle alors de 'persécution quasi étatiques'.') Also the term state-like powers is used.

### **3. (b)**

The de facto/local authority has to have control over a certain part of the country, and has to exercise state-like power, for a certain duration. The degree of intensity and the lasting nature of the de facto power are the determinant criteria in assessing the level of quasi state persecution. (EMRK 1993, no. 7: '...so das die entsprechende Organisation über staatsähnliche Gewalt verfügt. Eine solche Gewalt ist dann anzunehmen, wenn sie einen stabilen mit einer gewissen Dauer verbundenen staatsähnliche Einfluss auf das von ihr besetzte Territorium bzw. der dort lebenden Bevölkerung innehat'.)

In a recent decision it was decided that the Taliban in Afghanistan are capable of persecution in the sense of the Geneva Convention. (ARK 05-02-1997, EMARK 1997, no. 6: 'Verfolgungen durch die Taliban sind als 'quasi-staatlich' zu betrachten, da diese Gruppierung auf dauerhafte, stabile und effektive Weise in dem von ihr kontrollierten Teil Afghanistans – inklusiv Kabul – die faktische Herrschaft ausübt') In Algeria there is no de facto authority besides the central authority. The Muslim groups cannot be seen as such. (ARK 06-06-1995, EMARK 1996, no. 28: '...die islamitischen Gruppen in überwiegenden Teilen Algeriens weder effektiv noch dauerhaft eine faktische Herrschaft ausüben.')

### **3. (c)**

Every kind of available information is used. This information ranges from own research, information from NGO's, press releases, opinions of academics etc.

**4.**

Switzerland is not a member state of the European Union.

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## Country Report United Kingdom

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### Abbreviations

AC          Appeal Cases

CA          Court of Appeal

IAT          Immigration Appeals Tribunal

ImmAR      Immigration Appeals Reports

SSHD        Secretary of State for the Home Department

### 1. (a)

The relevance of persecution by third parties is accepted. Persecution is normally related to action by the authorities of a country. However it is also accepted that, in some circumstances, agents of persecution may be groups or elements within the applicants' country of nationality, other than the authorities. An applicant may qualify for asylum if the persecution by those elements is knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection, and the other inclusion criteria of the Convention are met. In practice it seems that the decisions taken on an asylum claim concerning persecution by third parties vary according to the body taking the decision.

The Home Office has, over the past year, been running a line on Algerian asylum claims that the duty of the State towards its citizens is no higher than to do its best within available resources to protect its citizens against abuses by armed opposition groups. Also in the first instance case of *Sangha* (*Sangha*, SSHD 02-02-1996, *ImmAR* 1996, p. 493) the suggestion is made that the authorities would have to give some measure of implicit approval to persecution by non-state agents for international protection to be warranted. These propositions were roundly rejected by a high level constitution of the Immigration Appeals Tribunal. The Appeals Tribunal followed par. 65 of the UNHCR Handbook, where it says that also when the authorities prove unable to offer effective protection this can lead to persecution. The Tribunal had already stated in 1991 in the case of an Egyptian national that: 'We accept that the Egyptian authorities would try to protect him but, in our opinion, there is a serious possibility that they would be unable to do this.' Refugee status was granted. (IAT 10-12-1991 8405.)



Also in the *Yousfi* case (IAT, *Yousfi*-case 02-1996, unpublished) the appellant has been recognised as a refugee. In the *Yousfi* case the following test is laid down: 'The real question is not whether the State authorities are doing the best they can in all the circumstances, but whether viewed objectively the domestic protection offered by or available from the State to the Appellant is or is not reasonably likely to prevent persecution. ....are the Algerian authorities able to provide effective protection against the GIA?' Also persecution by terrorist groups within a country could amount to persecution for a Convention reason if the government of that country was unable to control those groups.

It seemed that if persecution is effected by a third party, the case is much easier for the applicant if the authorities are unwilling to give protection, or if there is a plausible suspicion of tolerance of third party activities by the authorities than when a government is unable to give protection. Refugee status is not excluded, but more difficult to get. This seems especially to be the case in situations where the government is unable to give protection, despite the genuine and massive efforts to give it.

But after the *Yousfi* decision by the Immigration Appeals Tribunal the Home Office has modified its approach towards Algerian asylum claims. Also towards asylum seekers coming from other countries it has modified its approach. For instance in a 'reasons for refusal letter' dated 19 April 1996 (two months after the *Yousfi* case) in regard to a Bangladeshi asylum seeker. It was said there that 'it was only required that the authorities were unable to offer effective protection'.

# **1 (b)**

The Handbook under the Convention at par. 91 is not binding, but is of persuasive authority and this par. 91 is laid down in par 343 of the Immigration Rules. (IAT Mendis-case 17-06-1988, ImmAR 1989, p. 6.) The official criterion here is, whether it would be reasonable to expect the applicant to go to another part of the country. (CA, *Imad Ali El-Tanoukhi*-case 24-09-1992, ImmAR 1993, p. 71, 'If in the Secretary of State's view it is reasonable to expect an applicant to seek refuge in another part of the same country where he would be safe, the Secretary of State is not obliged to grant refugee status'.) It has been applied in the cases of Indian Sikhs, Sri Lankan Tamils and Turkish Kurds. It has however not proved critical in the majority of the cases.)

All the decisions mainly focus on the primacy of domestic protection over international protection; the latter replaces the former only when there is no part of the country from which the refugee has come that is safe.

It was considered not reasonable to expect someone to live in a remote village cut off from his wife and unable to pursue his employment as a trade un-

ionist as he had done for 30 years. (IAT, *Daniel Boahin Jonah*-case 11-02-1985, *ImmAR* 1985 p. 7.)

So it can be seen that the requirement of reasonableness encompasses not only the question of protection from harm but broader questions such as livelihood. (Queens Bench Division 15-01-1997, CO/2503/95: 'It can be seen that the issues raised by the Applicant's counsel in this case go back to both limbs, if I can put it that way, firstly, whether or not, as a matter of fact, there is a part of the country to which the Applicant can go where he would not have a well-founded fear of persecution and secondly, whether it would be reasonable to expect him to go there. The questions which have to be asked are such questions as the extent of the connection of the Applicant to the area which he is expected to return to by reason of the decision of the Special Adjudicator, and whether or not, as a result, he could be expected to have a satisfactory quality of life in that area') Also a decision of the Court of Appeal has provided an authoritative point of view in this matter. In the Robinson decision (01-08-1997 unpublished, cited in *Times*, 1st august 1997) is said that the real question is this: 'Can the claimant find effective protection in another part of his own territory to which he or she may reasonably be expected to move? ...We consider the test – 'would it be unduly harsh to expect this person to move to another less hostile part of the country?' – to be a helpful one. The use of the words 'unduly harsh' fairly reflects what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country'. Reasonableness can also include the medical condition of the appellant.

### **1. (c)**

The internal flight alternative is relevant only when the persecutor is a third party and not the state, unless it can be shown that the State's mandate does not run to the whole of the territory nominally under its control. The test of reasonableness (see above) of internal flight and persecution itself may well shade into one another, e.g. where the persecuting agents maintained country wide networks.

### **2. (a)**

There is only one decision of the IAT that averred that where there was no State, it was impossible to speak of agents of persecution. This decision has not been repeated and must be seen as an anomaly. Normally, people coming from a country where there is no longer a government can be accepted as refugees.

### **2. (b) and (c)**

Not relevant in the light of the answer to 2 (a).

**2. (d)**

The Convention is applicable to people coming from a civil war situation. Persons coming from a country in a full-fledged civil war are not often returned. In a case concerning Somalians and Bosnians, the Court of Appeal ruled that in a civil war context, valid claims were established where the persecution emanated from non-state perpetrators and the state's protection mechanisms had become dysfunctional. (CA, *Hassan Adan*-case 13-02-1997, *ImmAR* 1997, p. 251, also cited in *Times* 7th March 1997) However, for refugee status more is needed than just being a victim of generalized violence. Most people coming from a civil war situation who are allowed to stay get exceptional leave.

The practice of the Home Office is to assess each case individually. There is a mechanism whereby the Secretary of State declares a country to be one of upheaval: such a declaration triggers the right for people already in the UK to apply for asylum and to claim State benefits but it does not engender an automatic grant of temporary leave and such leave is normally granted after an examination of the case. However, the declaration also means that no-one is returned to that country while it is in upheaval.

So far this past year the Democratic Republic of Congo (former Zaire) and Sierra Leone have been declared countries of upheaval and applicants from those countries have been left in limbo while the Government waits to see what will happen. For applicants from other countries such as Afghanistan, Somalia, and Liberia, where there has been no formal declaration but no-one is returned, the refugee recognition rates are low, but the grants of exceptional leave to remain are almost 100 %.

**3. (a) (b) and (c)**

Not applicable

**4.**

The Court of Appeal has relied upon the mentioned paragraphs 5.2 and 6 of the Joint position. The Joint Position has been used by the Court of Appeal in cases concerning civil war. (CA 13-02-1997, *Hassan Adan*-case, *ImmAR* 1997, p. 251: 'Since writing this section of my judgement there has come to my attention an Act adopted by the member states of the European Union. This has, as I understand it no legal force but is clearly intended to establish administrative and diplomatic norms of interpretation. My own conclusion is, I believe, supported by that exposition.')

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